132-220

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. ~~224~~ 69

JAMES E. VANE, APPELLANT,

vs.

RICHARD S. NEWCOMBE AND JAMES G. SMITH, RECEIVERS OF THE BANKERS AND MERCHANTS TELEGRAPH COMPANY OF NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

FILED SEPTEMBER 10, 1886.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 334.

JAMES E. VANE, APPELLANT,

vs.

RICHARD S. NEWCOMBE AND JAMES G. SMITH, RECEIVERS OF THE BANKERS AND MERCHANTS TELEGRAPH COMPANY OF NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

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1 Pleas of the circuit court of the United States for the seventh judicial circuit and district of Indiana, begun and holden at the United States court-house, in the city of Indianapolis, in said district, on the first Tuesday of November, in the year of our Lord one thousand eight hundred and eighty-five, before the Honorable William A. Woods, judge of the district court of the United States for the district of Indiana and *ex officio* judge of said court.

BANKERS' AND MERCHANTS' TELEGRAPH COMPANY
vs.
BANKERS' AND MERCHANTS' TELEGRAPH COMPANY. } No. 7865.

In the matter of the intervening pe-tion of James E. Vane.

Be it remembered that heretofore, to wit, at the May term of said court, on the 4th day of October, 1884, before the Honorable William A. Woods, judge, as aforesaid, of said court, the following proceedings in the above-entitled cause were had, to wit:

Comes now the complainant, by C. W. Fairbanks, its solicitor, and files its bill of complaint herein in the words following, to wit:

2 To the honorable the judges of said court, in chancery sitting:

Humbly complaining, would most respectfully show unto your honors your orator, The Bankers' and Merchants' Telegraph Company of New York, a corporation duly created by and existing under the laws of the State of Indiana—

That the Bankers' and Merchants' Telegraph Company of New York is a corporation duly organized and existing under and by virtue of the laws of the State of New York, and that it exists as a principal parent or head corporation, with auxiliary or subordinate corporations, under the same name for local convenience and requirements, in the States of Massachusetts, Connecticut, New Jersey, Pennsylvania, Delaware, Ohio, Indiana, Illinois, Michigan, Tennessee, Kentucky, Texas, New Hampshire, and elsewhere, and likewise in Baltimore, in the State of Maryland, and in the District of Columbia.

Your orator further shows that all the said corporations so existent are separate and distinct corporations of each of the States aforesaid, and are controlled and managed by and wholly identified with the said Bankers' and Merchants' Telegraph Company
3 of New York, with local organization for the purpose of convenience and in conformity with law, the capital stock of said corporation being largely in the possession of said principal parent or head corporation.

Your orator further shows that the said Bankers' and Merchants' Telegraph Company of New York has partially constructed the lines of your orator, and operates and manages the same, and does a telegraph business in all the States above named, with the principal office for the transaction of business, for the executive manage-

ment, and for the receipt and disbursement of all money in the city of New York.

Your orator further shows that in the construction, management, and operation of the lines of your orator the said Bankers' and Merchants' Telegraph Company of New York has incurred certain debts to divers persons and corporations, the amount of which debts and the names of such creditors are now to your orator unknown; that the said debts or portions thereof are claimed to be in law and equity just obligations against the property of your orator.

4 Your orator further shows that the said Bankers' and Merchants' Telegraph Company of New York, in construction of a portion of the lines of your orator and in the operation and management of the same, became indebted to a large amount and to divers persons and corporations to your orators unknown, and that the larger portion of said indebtedness constitutes liabilities of said Bankers' and Merchants' Telegraph Company of New York, which is not chargeable to your orator or to its property.

Your orator further shows that the said indebtedness incurred as in said last paragraph alleged is claimed to be chargeable entirely to the property of your orator in the State of Indiana, but, as your orator is informed and believes, a large amount thereof does not constitute a legal or equitable obligation against your orator or its said property.

Your orator further shows that the said Bankers' and Merchants' Telegraph Company of New York is also largely indebted and is wholly insolvent, in consequence of which, by proceedings duly had and taken in the supreme court of the State of New York upon the complaint of one Austin G. Day, a judgement creditor, the said court

5 then having jurisdiction of the parties and the subject-matter, Richard S. Newcombe and James G. Smith were duly appointed receivers of the said Bankers' and Merchants' Telegraph Company of New York, its assets, property, and effects, and the same became vested in them.

Your orator further shows that the said Newcombe and Smith have duly qualified as such receivers and filed their bond, which has been duly approved, and entered into and upon the discharge of their duties and have taken possession of the property and effects of said telegraph company.

Your orator further shows that the said Bankers' and Merchants' Telegraph Company of New York and its property and effects are being wasted and scattered and its line of business broken up by reason of the fact that actions are being brought against it in all of the said States and attachments and executions levied thereunder, to the irreparable damage and injury of its creditors and stockholders; that, owing to the intimate relations between your orator and the said last-named corporation and by reason of said indebtedness, the property and effects of your orator are being wasted and scattered and its line and business broken up by reason of the fact that

6 actions are being brought against it on account of the indebtedness so incurred by the said Bankers' and Merchants' Telegraph Company of New York in the construction of a por

tion of the line of your orator and in the operation and management thereof; that the value of your orator's property consists in its being kept together and intact, to be operated as a whole, without a break or division, in connection with the property and lines of said Bankers' and Merchants' Telegraph Company of New York and under one head or management, and that, owing to the peculiar nature of the business, the management has to be centralized and managed accordingly.

Your orator further shows that, owing to the said intimate relations between your orator and the said Bankers' and Merchants' Telegraph Company of New York and owing to its management, operation, and control of your orator's lines and property, the accounts and business thereof have been so blended together that it is impossible for your orator to state, it having no information with respect thereto, what proportion of said property is the property of your orator and what proportion thereof is distinctly the
7 property of said Bankers' and Merchants' Telegraph Company of New York.

Your orator further shows that the said Newcombe and Smith have each given bonds in the said supreme court of the State of New York in the sum of fifty thousand dollars, duly approved by said court, and that the order appointing said receivers provides for the deposit of all accumulations of ten thousand dollars in a trust company in the city of New York, to be held under the direction of the court; that no moneys can come in to said receivers in any other way or at any other place than the said city of New York, and the said bond is ample and sufficient for the full protection of all parties in interest.

Your orator further shows that the said Bankers' and Merchants' Telegraph Company of New York is largely indebted to your orator on account of the management and control of its property and in the sum of —— dollars.

Your orator further shows that it is very important to your orator and to her creditors and the creditors of said Bankers' and Merchants' Telegraph Company of New York that the said property belonging to your orator and respondent should be taken into
8 the custody and control of the court so as to avoid a multiplicity of suits, and that the same may be properly preserved and cared for until an accounting between your orator and said respondent may be had and until their respective rights and interests in the said property may be ascertained and determined by this honorable court.

Your orator annexes hereto a record of proceedings whereby the said Newcombe and Smith were appointed receivers by the supreme court of the State of New York as aforesaid, marks the same Exhibit "A," and asks that the same may be taken as a part hereof.

Wherefore your orator prays that this honorable court will require the said respondent to enter into an accounting with her as to the indebtedness of said respondent, and will ascertain and determine the relative rights of the respective parties hereto to the lines and property heretofore constructed, operated, and maintained in the

State of Indiana by the said respondent and claimed to belong to said respondent or to your orator, and that, upon ascertaining the amount of said indebtedness and the relative rights and interests of your orator and said respondent to the lines and property
9 aforesaid, *that* this honorable court will require the said indebtedness to be paid to your orators and the relative rights and interests of the parties hereto to the said property to be apportioned between the parties hereto, as the nature of the case may require, and until the final determination hereof that this honorable court will appoint receivers to take possession of the lines and property, assets and effects, of your orator and the said respondent within the jurisdiction of this honorable court, and that a proper injunction issue restraining all persons from in any manner interfering with the said property, assets, and effects, and that your orator may have such further relief as justice may require and may be proper: that your honors will grant unto your orator the most gracious writ of subpœna issuing out of this honorable court under the hand of the clerk and the seal of the court, commanding the respondent to appear and answer the premises, but not under oath, oath being hereby waived, at a short date therein to be named.

And your orator will ever pray.

C. W. FAIRBANKS,
Solicitor for Complainant.

And at the same time, on said 4th day of October, 1884, before said judge, the following further proceedings were had, to wit:
10 The Bankers' and Merchants' Telegraph Company of Indiana having filed its bill herein, wherein it prays, among other things, for the appointment of receivers, and the said defendant having waived the issuance and service of process and duly entered its appearance and filed its answer herein, admitting the matters set forth in plaintiff's complaint, and the matter now coming on for hearing for the appointment of receivers herein, and the court being duly advised in the premises, it is hereby ordered, adjudged, and decreed that Richard S. Newcombe and James G. Smith be, and they are hereby, appointed receivers of all and singular the lines, property, and assets, real, personal, or mixed, of the complainant, the said Bankers' and Merchants' Telegraph Company of Indiana, and respondent, the said Bankers' and Merchants' Telegraph Company of New York, with the usual powers and duties of receivers, according to the practice of this court, including power and authority to demand, sue for, collect, receive, and take into their possession all the goods, chattels, rights and credits, moneys and effects, lands and tenements, of every kind and description
11 belonging to the said complainant and respondent or either of them situated within the jurisdiction of this court and manage and hold the same under the authority of this court.

It is further ordered that the said receivers forthwith execute and file their bond herein to the clerk of this court in the penal sum of one thousand dollars, to be approved by this court, conditioned for the faithful performance of their duties herein.

The said receivers are further authorized and directed to employ such agents, attorneys, and servants as may be necessary for the proper discharge of their duties as receivers; and

It is further ordered that the said defendant and all persons, partnerships, and corporations whatsoever be, and they are hereby, enjoined and restrained from interfering with the said receivers in their possession, control, and management of the property and rights, privileges and franchises, hereinbefore mentioned, and from interfering in manner with the receivers in the discharge of their duties, and from any collecting and receiving any debts due said corporations, and from paying out, selling, assigning, or transferring any of the estate,
12 moneys, lands, tenements, or effects of the said corporations except to said receivers or under the order of this court.

And afterwards, to wit, at the May term of said court, on the 14th day of October, A. D. 1884, before the Honorable William A. Woods, judge, as aforesaid, of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the receivers and file their bond herein in the sum of one thousand dollars, with Charles W. Fairbanks as surety thereon, which bond is approved by the court.

And afterwards, to wit, at the November term of said court, on the 7th day of March, A. D. 1885, before the Honorable William A. Woods, judge, as aforesaid, of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now James E. Vane, the petitioner, and upon reading and filing the petition herein of said Vane, together with all the papers thereto annexed, and it appearing to be just and proper that the rights of the petitioner shall be heard and determined, it is, on motion of the solicitors of said petitioner—

Ordered, 1. That said petitioner have leave to file said pe-
13 tition, subject to all rights of said receivers to object thereto hereafter.

2. That the said Richard S. Newcombe and James G. Smith, receivers of said Bankers' and Merchants' Telegraph Company, appear to and answer the said petition of said James E. Vane within 30 days from the date of service of notice of this order upon them, and the clerk of this court is directed to certify and mail a copy of this order to them forthwith.

3. That the request of said petitioner to proceed in the counties named in the petition to establish his rights in the proper courts of the State under the alleged lien notices against the property and earnings of said Bankers' and Merchants' Telegraph Company is hereby denied.

14 In the Circuit Court of the United States, District of Indiana.
In Equity.

JAMES E. VANE
vs.
RICHARD S. NEWCOMBE and JAMES G. SMITH, Receivers of the Bankers' & Merchants' Telegraph Company.

To the honorable the circuit court of the United States for the district of Indiana:

The petition of James E. Vane against Richard S. Newcombe and James G. Smith, receivers of the Bankers' & Merchants' Telegraph Company, respectfully shows—

1. That the said Bankers'.& Merchants' Telegraph Company is a corporation duly organized and existing under and by virtue of the laws of the State of New York; that in May, in the year 1884, it had erected, built, and completed a telegraph line from Freeport, Wood county, Ohio, to Hammond, Lake county, Indiana, and was in full use and occupation of said telegraph line and had established local offices properly connected therewith, and did so use and operate said telegraph line until the 23rd day of September, in the year 1884, when the said Richard S. Newcombe and James G. Smith
15 were appointed by this court receivers of the said telegraph company, which order of appointment and the proceedings therein and the records and papers thereof your petitioner begs leave to refer to so far as may be necessary as fully and with like effect as if made a part of this bill.

2. Your petitioner further shows to your honors that on the 17th day of June, in the year 1884, and before the appointment of the receivers aforesaid the said Bankers' and Merchants' Telegraph Company employed your petitioner to put six additional wires on and along the telegraph poles then owned by it from the said town of Freeport, in the State of Ohio, to the town of Hammond, in Lake county, Indiana, and to attach said wires to the proper fixtures and appendages to the said poles, so that said company might have and own when completed six additional independent wires between said points, and agreed with your petitioner to pay him as compensation for such work the sum of forty-five dollars for each and every mile of wires so put and strung upon said poles as aforesaid; and the said telegraph company agreed to furnish all of the wires and other material necessary to accomplish said purpose, which wire
16 and materials were to be delivered at the nearest distributive point along the route of said telegraph line; and said company agreed to pay all freight for the shipment of said wire and materials to the said various distributive points along said route and deliver the same to your petitioner free of any charges or expenses at the points aforesaid.

And your petitioner was to take said wire and materials to the telegraph line and to perform all and singular the labor necessary to complete and connect continuous lines aforesaid between the points aforesaid; and the said telegraph company further promised

and agreed to pay your petitioner at the end of each month for the work and labor thus done and performed by him for the month preceding; and your petitioner further says that the said telegraph company failed to make such monthly payments, whereby he was compelled to and did lay out and expend large sums of money in and about the performance of the work aforesaid, as will be more particularly stated hereinafter.

3. In pursuance of the agreements and covenants before
17 mentioned your petitioner immediately proceeded to construct, build, and equip the telegraph lines before mentioned, beginning at the town of Freeport, in the State of Ohio, and working westwardly; that on or about the 27th day of September, 1884, he had completed four of the telegraph lines to the town of Hammond, in Lake county, Indiana, and all six of said lines to the town of Lake Station, in Lake county, Indiana; that in the month of June, in the year 1884, said telegraph company directed your petitioner to construct two lines of wire westwardly from Hammond aforesaid, in the direction of Chicago, Illinois, and push the same forward with all despatch, in pursuance of which direction your petitioner did proceed to erect and construct two lines of wire westwardly from Hammond to a point about ten miles east of the courthouse in said city.

4. Your petitioner further shows to your honors that in the prosecution of the work of the said telegraph company it wholly failed to pay the freights on the wire and materials necessary in constructing its said line of telegraph, and failed to furnish your petitioner with
18 certain of the materials necessary, and then and there requested your petitioner to pay said freights and furnish said materials and push the work along as rapidly as possible, promising to repay your petitioner for the moneys thus furnished it; and your petitioner says that he furnished large sums of money in the payments of freight on the wire and material aforesaid and large sums of money for the purchase of materials necessary to be used and which were in fact used in the making and completing of the said line; all of which said sums of money will more fully and at large appear on exhibits attached to this bill, and to which your petitioner prays leave to refer with the like effect as if copied into this bill, and that they may be taken as a part hereof.

5. Your petitioner further shows to your honors that the payment to him of forty-five dollars per mile for making and constructing said telegraph line was in consideration and upon the promises of said telegraph company to furnish to him promptly the wire and materials at the nearest points of distribution along said line in
19 such manner as would cause him no delay for the want of them; but your petitioner says that the said telegraph company did not furnish the said wire and materials at the nearest points of distribution along said line in sufficient quantities to prevent delay, whereby your petitioner was delayed in the construction of said telegraph line by the negligence of the said company, to his great cost and injury; that such delays caused him to transport the men who were assisting him in constructing the said

line from one point to another at great expense and at times to keep them together unemployed and pay their board, all of which would have been avoided had the said company kept its promises and agreements by shipping the wire and materials to the points aforesaid promptly and without delay; and the said telegraph company caused the further delay of your petitioner and the men assisting him in said work by failing to pay the freight upon the said materials as it was furnished, whereby your petitioner and the said men were compelled to lie idle a large number of days, to your petitioner's great damage; all of which will more fully and at large appear —,
20 reference being had to the exhibits herewith filed, and to which your petitioner begs leave to refer with like effect as if copied into this bill, and which he craves may be taken as a part hereof; and your petitioner says that in right and justice he should be allowed and the telegraph company owes him a large sum of money for such delays, and which he begs may be allowed him on the final hearing of this cause.

6. Your petitioner further shows to your honors that he executed said work in all things as directed by the said company; that when he had completed the six lines to Lake Station aforesaid the said telegraph company was owing him a large sum of money, to wit, the sum of about sixteen thousand dollars; that, being fearful that the said company would not pay the same promptly and that delays would be had, he exercised the right, as he lawfully might, of detaching and disconnecting the said wires with their westerly connections, and then had and held physical possession of all the said six wires which formed the six connecting and continuous
21 lines between the points aforesaid, and, so having possession, refused to deliver the same to the said telegraph company or to any person in its behalf, but held the same for the purpose of protecting himself for the money then due and owing to him.

And your petitioner shows that in the month of August, 1884, the Merchants' Telegraph Construction Company, who were engaged in constructing the various lines of the said telegraph company's system, failed and became bankrupt, and A. J. Baldwin was appointed its receiver by some court or courts in the States of Ohio or Indiana, which are unknown to your petitioner.

That on or about the 23rd day of September, in the year 1884, the said Newcombe and Smith were appointed receivers of the said Bankers' and Merchants' Telegraph Company (that company then having failed), and from thence hitherto have been acting in that capacity; and your petitioner further shows that whilst he was in the physical possession of the telegraph lines constructed by him, and after disconnecting them with their western connections, the said receivers, aforesaid being desirous of getting possession
22 of said telegraph lines, entered into the following agreement and stipulation with him in consideration that he would allow the said lines to be connected with other lines running westerly into the city of Chicago, and which agreement is in the following words and figures—that is to say:

CHICAGO, ILL., *Nov.* 19*th*, 1884.

It is hereby agreed and understood that the telegraph wires on the poles of the Bankers' and Merchants' Telegraph Company in the State of Indiana which were strung by J. E. Vane, and upon which he claims a lien, shall be connected up with the wires of the said company from Hammond, Indiana, to Chicago, Illinois, now constructed and to be constructed, and shall be used for telegraph business by the receivers of said company; but it is also expressly understood that such use of said wires shall not be construed in any way or to any extent as impairing or interfering with the lien of the said Vane thereon.

(Signed) RICHARD S. NEWCOMBE,
JAS G. SMITH, *Receivers.*

And your petitioner says that under no consideration
23 would he have surrendered the possession of said wires except for the promises and covenants in the said writing aforesaid contained, and that he did not surrender the control and possession of said wires except upon the terms and conditions therein named.

7. And your petitioner further shows to your honors that in the month of September, in the year 1884, he caused notice to be given to the said telegraph company of his intention to hold a lien upon the corporate property and the earnings thereof of the said Bankers' and Merchants' Telegraph Company for all work and labor done and performed and all moneys advanced by him to and for the benefit of said company at its instance and request, and for that purpose filed the said notices in the offices of the recorders of the following counties, through which said telegraph line runs, namely, De Kalb, Noble, Elkhart, St. Joseph, La Porte, Porter, and Lake, all of which were duly recorded by the said recorders of the said several counties in a book kept by them for that purpose.

24 And your petitioner exhibits herewith and as a part of this petition copies of the notice of liens as filed and recorded in each of the said counties, together with the date of the recording thereof; and your petitioner avers that the said lien was taken out at and about the time of the completion of the said work and with all due diligence and without delay, whereby the said telegraph company and the receivers thereof had full notice of his intention to hold a lien upon the corporate property and earnings of said company for the work and labor done and performed by him and caused to be done by him and the money advanced and paid on account thereof for the benefit of said company.

And your petitioner shows that by section 5286, Revised Statutes of Indiana, 1881, he will lose all benefit of his lien upon the property and earnings of said company unless he be allowed to establish the same within six months after the filing thereof; and he further shows to your honors that on the 19th day of March, 1885, the time will expire in which he may proceed in the courts of said
25 counties to establish such lien, and that if he does not com-

mence proceedings before that time his lien acquired by the filing of said notices will be lost to him. He therefore asks and prays an order to be made herein by which he may be allowed to establish his lien against said telegraph companies in the said counties aforesaid, in this State, by a proper proceeding therein, and he tenders herewith to this honorable court an order of permission to proceed in said counties as before prayed, or, denying which, he asks that he may have and retain by the judgment and consideration of this court equal and equivalent liens upon the property of said corporation, so that he may not lose any specific lien which he now has.

8. Your petitioner further shows unto your honors that in October, in the year 1884, a settlement was had between your petitioner and one Robert Stewart, acting for the receivers of the said telegraph company, at which time the said Stewart, for and on behalf of said receivers, looked over, examined, and approved all
26 the accounts of your petitioner against said telegraph company and certified the same and his approval of them, and that such certification and approval, together with the bills, pay-rolls, and vouchers, are now in the hands of the said receivers, and he cannot therefore make them a part of this bill, but he prays that the said receivers, by an order of this court, may be ordered to produce them for inspection upon the trial of this cause; and your petitioner avers that the exhibits containing the accounts between him and the said telegraph company, herewith filed, substantially contain the same accounts so looked over, examined, and approved by the said Stewart in manner aforesaid, and that the sum appearing due therefrom does not materially differ from the accounts, pay-rolls, and vouchers forwarded by your petitioner to the said receivers.

9. Your petitioner further shows unto your honors that after the appointment of the said Newcombe and Smith as receivers they employed him, as he believes, with the permission of the court, to complete and connect the wires before described and which had been by him completed to Lake Station and Hammond, in
27 Lake county, Indiana, with their connections westwardly; that in pursuance of such employment he proceeded immediately to construct, complete, the said telegraph lines with the said westwardly connections, and did erect and complete them to the cable pole in the town of Lake, in Cook county, Illinois, a distance of about four miles from the court-house in said city of Chicago, for which said receivers agreed to pay your petitioner the sum of twenty-five hundred dollars, and said receivers employed your petitioner to do and perform other work in and about the premises, for which they agreed to pay him the sum of four hundred dollars; and your petitioner further shows that under the direction of the said receivers he purchased for them, to be used in and about the premises, a large amount of materials and paid freight bills upon a large amount of materials and done and performed various — sundry work for them at their instance and request, for which they agreed to pay your petitioner and to refund to him all moneys thus laid out and

28 expended for and on their behalf, amounting to a large sum of money, to wit, balance, $1,898.33.

And your petitioner shows that at the special instance and request of the said receivers, after he had completed the work aforesaid, he carried a large gang of men from the 2nd day of December, 1884, to the 16th day of February, 1885, paying them their wages and bearing their expenses, who performed work for said receivers in and about their receivership in repairing, fixing, and changing the said telegraph line whenever and wherever they were directed by the agents acting under said receivers, a bill of particulars of which and all that was done then under this clause of the bill is hereto attached and exhibited herewith and is asked to be made a part hereof.

And your orator shows that said bill of expenses, work, and the like last referred to has been audited and allowed by Robert Stewart, acting for and on behalf and at the instance and request of the said receivers aforesaid.

Wherefore your orator prays that he may have leave te file this his said petition against the receivers of said telegraph com-
29 pany, and that they be ordered by an order of this honorable court to appear hereto and make answer to all and singular the matters and things herein alleged and set forth, but not under oath, that being hereby expressly waived.

And will your honors grant unto your petitioner a permission to proceed at once in the counties in this State through which said telegraph line runs, in the proper courts of said counties, to establish said lien upon the property and earnings of said telegraph company to proper proceedings therein; or, denying which, will your honors protect said petitioner in his rights and have them established as prayed.

And will your honors further grant unto your petitioner that if the said account of your petitioner be in any way disputed or questioned that he may have leave to fully establish the same by competent and proper testimony.

And will your honors further grant unto your petitioner the right to take possession of the said telegraph lines constructed by him and which *was* surrendered to the receivers in manner and form as aforesaid and not otherwise; or, denying which, will your
30 honors declare that the said lines of telegraph so constructed by your petitioner *is* subject to a lien for the payment of your petitioner's claim or so much thereof as your honors may deem equitable and just.

And upon the final hearing will your honors adjudge and decree to your petitioner the full amount of his claim and order the said receivers to pay the same out of the first moneys coming into their hands and as a preferred and superior lien to any and all others except those of like class.

And will your honors adjust and adjudge the amount now due from the said telegraph company to your petitioner and grant all

other and further relief which in equity and good conscience he may be entitled to; and your petitioner will ever pray, *and* etc.

JAMES E. VANE, *Petitioner.*

WILLIAMS & CUMPACKER,
HARRIS & CALKINS,
Solicitors for Petitioners.

UNITED STATES OF AMERICA,
State of Indiana, Marion County, } *ss:*

31 James E. Vane, being duly sworn, says that the foregoing petition is true to his own knowledge, except as to matters therein stated to be alleged upon information and belief, and that as to those matters he believes them to be true.

JAMES E. VANE.

Sworn to before me this 7th day of March, 1885.

[SEAL.] CHAS. R. MYERS,
Notary Public.

32. EXHIBIT No. 1.

First exhibit to accompany bill and petition of James E. Vane, showing the state of accounts between him and the Bankers' and Merchants' Telegraph Company at the time the receivers took possession of the property and effects of said company, and which is referred to in the petition of said Vane, herewith filed.

Bankers' and Merchants' Telegraph Company to James E. Vane.

DR.

Sept. 24.	To putting on arms and insulators and stringing six (6) wires from Freeport Junction, Ohio, to Lake Station, Ind., 248 miles, @ $45.00 per mile	11,160 00
	To putting on cross-arms and insulators from Lake Station to Hammond and stringing four (4) wires, No. 6, in said 16 miles, @ $57.50 per mile	600 00
	To stringing two No. 6 wires from Hammond to junction of board trade lines, 28 miles, @ $20.00 per mile	560 00
		12,320 00
		12,320 00

33 *Bankers' and Merchants' Telegraph Company to James E. Vane.*

DR.

1884.		For extra work done in July:	
July	1.	To 2 double anchor guys between Weston and McClure	2 00
"	2.	To 8 double anchor guys between Weston and McClure	8 00
"	2.	To moving 9 poles out of orchard to road 2 miles north of Weston	27 00
"	3.	To 1 double anchor guy	1 00
	4.	" 3 " " "	3 00

1884.

July	6.	To livery, Goshen to Jamestown, to find am't left by Barrow	4 00	
"	7.	To livery from Weston to Freeport, looking for wire and glass	3 00	
"	11.	To hauling 4 45-ft. poles 8 miles east of So. Bend and hauling 4 30-ft. back	5 00	
"	11.	To changing same	12 00	
"	12.	To taking down 1 40-ft. and putting up 1 45-ft. and raising one on other side of track at So. Bend	10 00	
"	14.	To setting 2 poles & moving & splicing 1 pole east of Edgerton	10 00	
"	"	To 1 day's work of 18 men & 1 team *of* putting a-chor guys & *guys &* straightening pole on So. Bend loop	45 00	
"	15.	34 To setting 5 poles, hauling 1 pole 5 miles, & splicing and setting 2 poles	20 00	
		To 2 double anchor guys 4 miles west of Edgerton	2 00	
"	16.	To bracing 8 cross-arms, 6 guard irons, 6 sections slack, moving 3 poles and 2 anchor guys	14 00	
"	"	To hauling 1 tall pole 4 miles west of K'ville & setting same and pulling up 8 sections slack	8 00	
"	17.	To setting 2 poles and moving 3 poles & 3 anchor guys & 4 sections slack east of Butler	15 00 7 00	
"	18.	To setting & splicing 2 poles and 5 anchor guys west of Butler	8 00 5 00	
"	"	To moving 1 pole near Wawaka & cutting down 1 walnut tree	5 00	
"	24.	To cutting 2 large elm trees	6 00	
July 22 to 29.		For building line into Kendallville with 4 30-ft., 6 40-ft., 4 45-ft., 2 50-ft., 1 55-ft., & 1 60-ft. poles & 4 guy poles, stringing thereon & cutting in 20 wires, shaving & wrapping & painting poles, & cutting & hauling 1 60-ft. pole	356 00	
July	12.	35 To telegrams to So. Bend for glass	30	
"	15.	" telegrams to Edgerton for arms	30	
"	17.	To telegrams to Kend'ville for glass	40	
"	21.	" telegrams, La Porte, for poles	60	
"	22.	Livery acc't of K'ville, looking for poles	3 00	
"		To unloading poles	75	
"	31.	To cutting in office & moving office poles at Butler, Ind.	12 00	
"	31.	To cutting in office at Napoleon, Ohio	10 00	
				603 35

Am't taken out of the total on this page, being for money laid out by Mr. Vane, $27.60.

36 For extra work done during month:

Aug.	1.	To moving 4 poles, $2.00, & 5 double guys, $5.00, at Hawaka & Butler	17 00	
	2.	To moving 3 poles, $9.00, & 2 double guys, $2.00, at Waterloo and Edgerton	11 00	
	6.	To 1 double anchor guy east of Edgerton	1 00	
	7.	To 3 anchor guys, $3.00, & 20 double guys, $20.00, between Chesterton and Lake	23 00	
	8.	To 8 double guys near Christman's	8 00	
	9.	To moving 4 poles east of Weston	12 00	
	11.	To moving 11 poles, 33.00, & eight anchor guys, $8.00	41 00	
	"	To 1 brace pole at Portage, W. of So. Bend & E. of Hammond	2 00	
	12.	To moving 3 poles, 9.00, & 2 anchor guys, 2.00, east of So. Bend	11 00	
	13.	To moving 6 poles, 18.00, & 1 anchor guy, 1.00, west of So. Bend, for house-movers	19 00	
	14.	To 2 anchor guys at So. Bend	2 00	
	15.	To moving 11 poles at So. Bend for house-movers	33 00	
	"	To putting on 6 cross-arms & going after them at So. Bend for house-movers	6 00	

Aug. 16.	37	To moving 4 poles, 12.00, & 3 men cutting 15 ties east of Crum's Point	18 00	
	18.	To moving 2 poles, 6.00, & 2 men cutting trees at Kankakee swamp	10 00	
	20.	To moving 4 poles, 12.00, 6 double anchor guys, 6.00, at Crum's Point & Mill Creek	18 00	
	22.	To moving two poles near Mill Creek	6 00	
	23.	To setting 1 pole, $3.00; moving 3 poles, 9.00	12 00	
		5 anchor guys, 5.00; 6 double guys, 6.00, west of Mill Creek	11 00	
	25.	To 1 double anchor, 1.00, & 8 double guys, 8.00, E. of La Porte	9 00	
	27.	To changing of 18 poles out of field across the road and running wires on same—12 men & 4 teams 2 days' work	72 37	
	30.	To stringing 9 poles, 18.00; moving 3 poles, 9.00, & 2 anchor guys west of Otis	27 00 2 00	
		To putting on 285 arm braces between Freeport & Hammond, @ 0.12½ per piece	35 62	
				406 99
			406 99	

Mem. for Martin.—Take of this page for cash items $59.00.

38 For extra work & delay during mo.:

1884.

July	5.	For 1 day delay, 12 men & 1 team moving from Freeport to Weston, on % of not having material	30 50	
"	8.	For 1½ days' delay of 16 men & 2 teams waiting for arms west of Goshen	64 98	
"	12.	For 6 men and 1 team going back 12 miles to Bryan, Ohio, to put on glass, ½ day work	8 80	
"	21.	For 1 day's delay of fifteen men & 2 teams waiting for wire & glass at Mill Creek	20 22	
"	22.	For ½ day delay of 12 men & 1 team going back to put on glass at Wawaka	14 51	
"	23.	For ½ day's delay of 17 men & 2 teams waiting for wire & glass east of La Porte	22 35	
"	30.	For ½ day delay of 12 men & 2 teams, going back to put on glass at Ligonier	17 26	
				178 62
Aug.	4.	For 14 men & 1 team, waiting ½ day for wire at Chesterton	17 28	
"	5.	For 14 men & 2 teams, waiting 1 day for wire at Miller's	40 07	
"	5.	For 10 men & 1 team, 1 day delay going from Edgerton to Napoleon, on % of not having material	26 86	
		39		
"	6.	For 10 men & 1 team, ½ day waiting for glass at Napoleon	13 43	
"	"	For 1 team hauling 4 bbls. glass from Freeport to Napoleon, 38 miles	8 00	
"	"	For 14 men & 2 teams, ½ day in changing men from Miller's to Chesterton	20 03	
"	8.	For 14 men & 2 teams, ½ day waiting for material at Chesterton	20 08	
"	9.	For 12 men & 1 team, 1 day waiting for material at So. B.	30 16	
"	10.	For 14 men & 2 teams, 1 day straightening loop & taking out slack while waiting for material at Hammond	40 07	
"	13.	For 12 men & 1 team, 1 day's delay waiting for glass to arrive at Freeport, none being at Weston	30 48	

Aug. 13.	For 11 men & 1 team, ½ day at Barron at So. Bend trying to get a guy on corner pole		14 18		
" 20.	For 12 men & 1 team, ½ day guying & cutting in office at Freeport		15 24		
" 15.	For 11 men & 1 team, ½ day waiting at Crum's Point for wire		14 18		
Aug., ½ 18 19, 20.	40	For 14 men & 2 teams, 2½ days' work & waiting for orders from N. Y., being stopped by Brennen	100 17		
Aug. 22, 23, 24.		For 4 climbers untying & putting on glass & retying 14 miles of wire E. of La Porte, 3 days	25 44		
Aug. 20, Sept. 2.		For 1 man, 14 days' delay waiting at Edgerton, Ohio, for glass, from Aug. 20 to Sept. 2, inc., @ $35.00 per mo. & expenses	29 88		
				445 50	
					624 12
				624 12	

Mem. for Martin.—Nothing to come out of this for cash items.

1884.		For extra work & delay, mo. of September:			
Sept. 1.		To 1 double anchor guy		1 00	
2.		" 6 anchor guys west of Dunham		6 00	
3.		" 11 men & 1 team, ½ day waiting for wire at Dunham		14 42	
4.		To moving 1 pole		3 00	
5.		" " " & 1 anchor guy		4 00	
9.		To 11 men & 1 team, ½ day waiting for wire at Lake Station		14 42	
5.		To 11 men & 1 team, ½ day waiting for wire at Otis		14 42	
8.		To moving 2 poles west of Otis, & 4 anchor guys	6 00 4 00		
9.	41	To moving 6 poles and 3 anchor guys east of Lake Station		21 00	
Sept., ½ 11 to ½ 19.		To 8 days trimming, guying, & bracing line between Lake & Hammond while waiting for wire from Springfield, from Sept. 11½ to Sept. 19½, inc., 11 men & 1 team		230 72	
Sept. 30.		To 2 men & 1 team, 8 days finishing line & waiting on orders at Hammond		89 28	
" 30.		To personal & traveling expenses & time for month of September		125 00	
					533 26

(Mem. for Martin.—Take from this for cash item $136.00.)

Expenses account for month of July, as per statement No. 1, line report:

Labor	4 00	
Hauling & livery	9 50	
Freight charges paid by Vane	197 87	
Materials & tools purchased	40 73	
Miscellaneous expenses	2 00	
Balance due on June line report	8 84	
		262 94

Expense account for month of Aug., as per statement No. 2, line report:

42	Hauling & livery	33 00	
	Freight charges paid	322 80	
	Materials and tools purchased	14 89	
	Miscellaneous	11 89	
			382 58

1884. For materials furnished for lines:

July 2.	To 4 30-ft. poles, @ 2.50		10 00	
	" 6 40 " " @ 4.00		24 00	
	" 4 45 " " @ 5.50		22 00	
	" 1 50 " " @ 6.00		6 00	
	" John Mitchell's bill, viz:			
	1 butternut pole, 45 ft., @ 3.00			
	" " " 50 " " 4.00		13 00	
	" blue ash " 30 " " 6.00			
	Used on Kendallville loop:			
	To 4 45-ft. poles, @ 5.00		20 00	
	" 2 45 " " @ 5.00		10 00	
	Used at So. Bend & 8 miles east:			
	To 1 bbl. poney insulators, 280, @ 4½c.		12 60	
	To 3 bbl-. standard insulators, 750, @ 5c.		37 50	
	To 2 bbl-. standard insulators, 400, @ 5c.		20 00	
			175 10	
43	To personal expenses, paying freight, and looking after material for month of July		50 00	
	To personal expenses, paying freight, and looking after material for month of August		50 00	
			100 00	
				275 20

(Mem. for Martin.—All these items seem to be cash.)

Expense account for month of September, line report No. 3:

Hauling & livery	2 50	
Freight charges paid	91 56	
Materials & tools purchased	3 70	
Miscellaneous	10 60	
		108 36
Making grand total of		$15,516 70

CONTRA.

By cash, per J. G. S.	300 00	
" " "	200 00	
	500 00	
		15,016 70
To which should be added vouchers of Delune		52 92
		15,069 62

44

No. 2.

Exhibit to 9th Clause of Vane's Petition.

CHICAGO, ILLS., *Feb'y* 17, 1885.

Bankers' and Merchants' Telegraph Co., Newcombe & Smith, receivers, to James E. Vane.

DR.

Stringing two wires from cable pole cor. 39th & School St., in town of Lake, Cook Co., Ills., to Lake Sta., Lake Co., Ind., and two wires from cable pole to Hammond, Ind., and two wires from cable pole to board of trade junction	2,500
To taking off cross-arms, putting on and changing wires, upsetting poles, anchoring corners, and stringing two St. Louis wires from junction to cable pole	400
Putting on 500 arm braces, @ 10c.	50

Nov. —.	Expenses as per vouchers and statement attached		64 97
Dec. —.	Expenses as per vouchers and statement attached		316 41
	Expenses of Thomas Gang, Dec. 21 to 31st		158 04
			3,489 42

CR.

Nov. 10.	By checks from Newcombe & Smith	1,000	
Dec. 6.	" " "	500	
" 29.	" " "	1,000	
			2,500 00
			989 42

45

DR.

Jan'y —.	Labor	283 78	
	Meals & lodgings	241 30	
	Hauling & livery	70 00	
	Freight charges	2 24	
	Material & tools	27 18	
	Miscellaneous	18 40	
Feb'y —.	Labor	144 21	
	Meals & lodgings	75 70	
	Hauling & livery	37 50	
	Miscellaneous	8 60	
			908 91
			1,898 33

Exhibit to Bill of Vane, Showing Mechanics' Lien & Date of Filing.

DE KALB COUNTY:

Notice is hereby given to the Bankers' and Merchants' Telegraph Company, incorporated and organized under the laws of the State of New York, doing business in the county of De Kalb, in the State of Indiana, and all others interested:

You are hereby notified that I, James E. Vane, hereby intend to hold a lien upon the poles and wires strung thereon, the switch-boards, telegraph instruments, and battery and all other fixtures and property of said company, together with all the earnings of said company in said county of De Kalb. I hold this lien for
46 work and labor done and performed and materials furnished in the construction of their line of telegraph through said county and at their special *intent* and request, to the amount of sixteen thousand dollars. The labor was performed and materials furnished on and after the 15th day of June, 1884. That he intends to hold this lien upon all the poles, wire strung and unstrung, switch-boards, telegraph instruments & batteries, whether in use or not, and all fixtures and property belonging to said company in said county of De Kalb, together with earnings thereof, until his claim is paid and satisfied.

September 15, 1884.

JAMES E. VANE.

Endorsed as follows:

"Received for record the 19th day of Sept., 1884, at 11 a. m., and recorded in Miscellaneous Record B, page 419.

(Signed) M. BOLAND,
Recorder, De Kalb Co., Ind."

NOBLE COUNTY:

A like notice was filed for record in Noble county and is endorsed as follows:

"Received for record Sept. 19th, 1884, at 2 o'clock p. m.; recorded in Record 1, page 285.

(Signed) JAMES G. LASH,
Recorder, Noble Co., Ind."

47 ELKHART COUNTY:

A like notice was filed in Elkhart Co. and is endorsed as follows:

"Rec'd for record Sept. 18, 1884, at 2 o'clock p. m.; recorded in Miscellaneous Record No. 3, at page 505.

(Signed) J. W. KOONTZ, *R., E. C.*"

ST. JOSEPH COUNTY:

A like notice was filed in St. Joseph county and is endorsed as follows:

"Received for record the 18th day of Sept., 1884, at 1 o'clock p. m., and recorded in Miscellaneous Record D, page 353.

T. M. HOWARD,
Recorder, St. Joseph County."

LA PORTE COUNTY:

A like notice was filed in La Porte county and is endorsed as follows:

"Received for record at 11 o'clock a. m., Sept. 18, 1884, and recorded in Miscellaneous Record No. 4, page 120.

D. J. McMURRAY, *R., L. C.*"

PORTER COUNTY:

A like notice was filed in the office of the recorder of Porter county and is endorsed as follows:

"Received for record this 19th day of September, 1884, at 8 o'clock a. m., and recorded in Mechanics' Lien Record No. 2, on page 133.

(S'g'd) WM. C. WELLS,
Recorder of Porter Co., Ind."

LAKE COUNTY:

A like notice was filed in the office of the recorder of Lake county and is endorsed as follows:

"Rec'd for record Sep. 19, 1884, 11 a. m., and recorded in Mechanics' Lien Record No. 1, page 127.

(S'g'd) RICHARD W. PRICE,
Recorder, Lake Co., Ind."

48 And afterwards, to wit, at the May term of said court, on the 2nd day of May, A. D. 1885, before the Honorable William A. Woods, judge, as aforesaid, of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the receivers, by Harrison, Miller & Elam, their solicitors, and file their answer to the petition of William W. Boone, and also their answer to the petition of James E. Vane herein; and said answers are in the words following, to wit:

1. Richard S. Newcombe and James G. Smith, receivers appointed by the court herein, for answer to the intervening petition of James E. Vane say that their connection with the said Bankers' & Merchants' Telegraph Co. is of a later date than the occurrences out of which the petitioner claims that his demands against the said company originated, and they have no definite knowledge or information as to the truth or falsity of the averments in said petition contained. They therefore deny all and singular the said averments and allegations and ask that said petitioner be required to
49 make strict proof of his said claim in the premises.

2. For a second and further answer herein to the petition of said Vane the said receivers aver that long before the filing of said petition said claim was fully paid and satisfied by said company.

3. For a third and further defense to so much of said petition of said Vane as seeks to enforce a lien upon said telegraph property and its rents and incomes the said receivers say that the said petitioner did not in his transactions with said company occupy the relation of an employee to said company, but of a general contractor, and he was not, by reason of his said relation, entitled to claim or enforce a lien against the said property.

4. For a fourth and further answer to so much of said petition as seeks to enforce a lien said receivers say that said petitioner is not entitled to have or enforce such lien as a first lien against said property for the reason that long prior to the filing of said petition these receivers had, by and under the order and direction of the
50 supreme court of New York and by and under the direction of this court, executed receivers' certificates to the amount of one hundred and thirty thousand dollars to be used in payment of the debts of said Bankers' and Merchants' Telegraph Co. and twenty thousand dollars to be used for the purpose of completing the construction of said telegraph lines, which certificates were by the order of the supreme court of New York, bearing date the — day of November, 1884, and by order of this court in this suit, bearing date the 15th day of December, 1884, made a first charge and lien upon all the property of said telegraph company within said State of Indiana, and in pursuance of said orders and under the authority thereof these receivers executed, acknowledged, and recorded a mortgage to secure the payment of said receivers' certificates, which mortgage bears date November 7th, 1884.

All of which facts will more fully and at large appear by refer-

ence to the files of the court in this case, to which reference is made as a part of this answer.

51 These receivers further say that said receivers' certificates, amounting to $150,000.00, so issued were negotiated and are outstanding in the hands of innocent persons who took them as innocent purchasers without notice.

Wherefore these receivers say that said claimant is not entitled to a lien in any event except subject to said receivers' certificates and mortgage.

5. For a further answer as to so much of said petition as seeks to enforce said lien these receivers say that long prior to the rendering of the services out of which the petitioner's claim arises there had been executed by said company, acknowledged and recorded, a general mortgage upon all and singular its property in the State of Indiana, as well as the other States through which said lines extend, covering also the franchises, rents, and profits of said company to secure an issue of bonds, amounting in the aggregate to $10,000,000, which had been negotiated and were at the time said claim originated and still are outstanding, unpaid, and in the hands of persons who took the same for value and without notice of any

52 equities against the same.

Wherefore these receivers pray judgement.

HARRISON, MILLER & ELAM,
Solicitors for Receivers.

And afterwards, to wit, at the May term of said court, on the 5th day of May, A. D. 1885, before the Honorable William A. Woods, judge, as aforesaid, of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now James E. Vane, by Messrs. Harris & Calkins, his solicitors, and files his replication to the answer of the receivers herein in the words following, to wit:

Replication of James E. Vane to the Answer of Richard S. Newcombe and James G. Smith, Receivers.

This repliant, saving and reserving to himself all and all manner of advantages of exception to the manifold insufficiency of the said answer and each paragraph thereof, for replication thereunto saith that he will aver and prove his said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer and each paragraph thereof of the said receivers,

53 Newcombe and Smith, is uncertain, untrue, and insufficient to be replied unto by this repliant, without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to prove to this honorable court as it shall direct, and humbly prays as in and by his said petition — hath already prayed.

HARRIS & CALKINS,
Solicitors, &c.

And afterwards, to wit, at the May term of said court, on the 6th day of May, A. D. 1885, before the Honorable William A. Woods, judge, as aforesaid, of said court, the following further proceedings in the above-entitled cause were had, to wit:

Upon reading and filing the verified petition of Richard S. Newcombe and James G. Smith, receivers of the Bankers' and Merchants' Telegraph Company, and it appearing therefrom that said petitioners were duly appointed by the supreme court of New
54 York receivers of the Bankers' and Merchants' Telegraph Company, a corporation organized and existing in that State and having certain subsidiary corporations under the same name within other States, including the State of Indiana, the entire stock and property of such subsidiary corporations being owned and managed by said Bankers' and Merchants' Telegraph Company of New York; and it further appearing that said petitioners were, in a certain action in this court, wherein The Bankers' and Merchants' Telegraph Company was plaintiff and The Bankers' and Merchants' Telegraph Company defendant, on the 4th day of October, 1884, duly appointed receivers of all the property of said Bankers' and Merchants' Telegraph Company in this State; and it further appearing that, in order to fulfill their duties as such receivers, it has become necessary for said petitioners to raise money by the issue of receivers' certificates under orders duly granted by the supreme court of the State of New York, and that certificates to the amount of $470,052.06 in par value have been issued, which certificates are intended
55 to be a lien and charge on all the property of said Bankers' and Merchants' Telegraph Company paramount to the mortgage for ten millions dollars executed by said company to the Farmers' Loan and Trust Company as trustee, and to all other liens on the property of said company within this State; and after hearing C. W. Fairbanks, of counsel for said receivers, in support of said application, and John A. Holman, att'y for defendant, it is ordered and decreed that all the receivers' certificates heretofore issued by said Richard S. Newcombe and James G. Smith, as receivers of the Bankers' and Merchants' Telegraph Company, under and in pursuance of the judgement and decree in the action therein mentioned, wherein Alexander H. De Haven is plaintiff and The Bankers' and Merchants' Telegraph Company and others are defendants, bearing date the 6th day of January, 1885, amounting altogether to the sum of four hundred and seventy thousand and fifty-two dollars and six cents, be, and the same are hereby, declared to be a lien and charge upon all and singular the lines, property, assets, and effects,
56 real, personal, and mixed, of the Bankers' and Merchants' Telegraph Company within this State paramount to the lien of the mortgage of ten million dollars ($10,000,000) heretofore executed by the Bankers' and Merchants' Telegraph Company to the Farmers' Loan and Trust Company as trustee, and to all other liens and charges, except that they shall be subsequent to the lien of the certificates heretofore issued herein, amounting to $130,000.

And afterwards, to wit, at the May term of said court, on the 16th day of May, 1885, before the Honorable William A. Woods, judge, as aforesaid, of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the petitioners, Boone and Vane, by Harris & Calkins, their solicitors, and at the same time come the receivers, by Harrison, Miller & Elam, their solicitors, and now, by consent of said parties and upon their motion, it is ordered that the petitions of William W. Boone and James E. Vane herein be, and the same are hereby, referred to William P. Fishback, Esq., master in chancery, to
56½ take the evidence and report the same, together with his findings thereon, to this court with all convenient speed.

And afterwards, to wit, at the May term of said court, on the 5th day of October, 1885, before the Honorable William A. Woods, judge, as aforesaid, of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the receivers, by Harrison, Miller & Elam, their solicitors, and upon their motion it is ordered that George W. Vulte, of the city of New York be, and he is hereby, appointed special examiner in chancery in the matter of the above petition in this cause, and is empowered to cause to come before him, at his office, in said city, No. 45 William street, upon proper notice given to the petitioners, the witnesses of the receivers, and to take their depositions in writing and return the same, duly certified, into this court, addressed to the clerk thereof, at Indianapolis.

57 And afterwards, to wit, at the November term of said court, on the 30th day of January, A. D. 1886, before the Honorable William A. Woods, judge, as aforesaid, of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now William P. Fishback, Esq., master in chancery, and files his report, taken on the intervening petition of James E. Vane, in the words following, to wit:

In the Matter of the Intervening Petition of JAMES E. VANE.

For the petitioner, Harris & Calkins.
For respondents, Harrison, Miller & Elam.

To the honorable court:

The undersigned, the master to whom said petition was referred, now respectfully reports to the court as follows:

I was attended at the hearing by Mr. Calkins for petitioner and by Mr. Miller for respondents.

The evidence produced at the hearing consists of the following items, viz:

Evidence of James E. Vane, taken before me, at Indianapolis, May 21st, 1885, with exhibits thereunto and referred to in said evidence.

Depositions of Edward S. Pigott, taken before George W. Vultee, with exhibits filed in this cause November 4, 1885.

58 Depositions of Jas. G. Smith and Robert Stewart, taken before Charles Nettleton, notary public, and published in this cause July 29, 1885.

All of said evidence is filed in court with this report as a part thereof.

Mr. Vane, the petitioner, was employed by the telegraph company to put on arms and insulators and to string additional wires on the poles of the company from Freeport Junction, Ohio, to Lake Station, Indiana, a distance of 248 miles, for $45.00 per mile. The company agreed to furnish and deliver to Vane, at the nearest accessible railway stations, all the necessary material for the work. Vane was to do or furnish the labor necessary to string the wires, etc. He did the work, hiring men for the purpose and assisting in person. The amount owing to him on this account is eleven thousand one hundred & sixty dollars ($11,160.00).

He also put in cross-arms and insulators and strung four wires from Lake Station to Hammond, sixteen miles, at thirty-seven dollars and fifty cents per mile, the company furnishing material and Vane doing or furnishing the labor. The amount owing to him on this account is six hundred dollars ($600.00).

He also strung two wires from Hammond to the junction
59 of the Chicago Board of Trade lines, 28 miles, at $20 per mile, for which there is due him five hundred & sixy dollars ($560.00).

During the progress of the work the company failed to furnish the material as it was required, so that the men working for Vane were without employment a portion of the time. Vane asked for instructions and was directed by the company to keep his men together during the delay thus caused, it being the understanding that the company would pay their board while they were waiting. The master is of the opinion that it is to be fairly inferred from the evidence that the company would pay for the time thus lost, Vane being required to pay his men as if they were at work.

Vane also made some advances for freight on material shipped to him, but which he could not obtain possession of until the freight was paid. He also paid out various sums of money for livery hire, telegrams, etc., made necessary by the company's failure to furnish material promptly.

He also did extra work on the line, at the request of the company, which was not covered by the original agreement.

60 The amount due him for this extra work and for the time of his men lost by delay is $1,951.12.

The amount due him for cash advanced to pay freight, livery hire, telegrams, etc., is $1,298.50.

August 11, 1884, he was paid	$300 00
Sept. 11, " " " "	200 00
Total credits	$500 00

Exhibit No. 1, which was filed March 7, 1885, contains all the

foregoing items in detail and has been audited and approved by the company. There is no controversy as to the amount.

The only real question is as to what preference or lien, if any, has the intervener.

The master is of the opinion that in doing this work Mr. Vane was an employee of the company within the meaning of section 5286, Revised Statutes of Indiana (1881). He has filed his notice, as required by section 5287, in the counties through which the telegraph is built.

This lien covers the following items:

For stringing wires, 248 miles, $45 per mile	$11,160 00
" putting in cross-arms from Lake Station to Hammond	600 00
" stringing 2 wires from Hammond to Junction, etc.	560 00
" extra work & delay	1,951 12
	$14,271 12
Deduct credits	500 00
Bal. due	$13,771 12

I find and report that he has no lien as to the sum of $1,298.50 for cash paid for freight, livery, etc.

Vane's claim accrued prior to the order made by the supreme court of New York Nov. 3rd, 1884, authorizing the issue of $150,000.00 of special receivers' certificates, to secure which a trust deed or mortgage was executed, and I report and find that for said sum of $13,771.12 Vane is entitled to priority over the lien of the certificates above named.

Vane also asserts a right to a common-law lien, which he bases on the following facts which are not controverted: The contract with Vane was made in June, 1884. November 12, 1884, the work was practically done, but the connections were not made. Mr. Vane kept possession of the wires by refusing to allow connections to be made, and turned the ends of the wires down into the ground. He retained such possession until November 20, 1884, when he delivered possession to the receivers with an agreement that such de-
62 livery was not to impair any rights or liens he might thus have by virtue of such possession. He had such possession when the order allowing the issue of receivers' certificates was made and also when the certificates were issued, November 11, 1884.

I report and find that by perfecting his claim for a lien under the statute Mr. Vane waived the right he had, if any, to assert his common-law lien.

In addition there is due to Vane from the receivers for work done for them $1,898.33. The work was done after the certificates were authorized by the order of Nov. 3, 1884, but before the issue of the certificates issued by subsequent orders. I report and find that for the sum last named Vane should be postponed as to the issue of $150,000 of certificates, but that he should be preferred as to those which were subsequently issued.

Transcripts of the various orders of the supreme court of New York authorizing the issue of receivers certificates are attached to the deposition of Mr. Edward Piggott, filed herewith.

Respectfully submitted. WILLIAM P. FISHBACK, *Master.*

63 And afterwards, to wit, at the November term of said court, on the 4th day of February, A. D. 1886, before the Honorable William A. Woods, judge, as aforesaid, of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the receivers, by their solicitors, and files their exceptions to the report of the master in chancery upon the petition of Vane herein in the words following, to wit:

Richard S. Newcombe and James G. Smith, receivers of the Bankers' & Merchants' Telegraph Company, except to the report of William P. Fishback, Esq., master of this court, to whom said petition of said Vane was heretofore referred, which said report was filed in this court on the 30th day of January, 1886, for these reasons, to wit, that is to say:

First exception. For that said master has certified that said Vane, the intervener, was an employee of the said company within the meaning of section 5286 of the Revised Statutes of Indiana (see acts 1881), and by virtue of the notice filed by him, as required by section 5287 of the Revised Statutes of Indiana aforesaid, has

64 acquired a lien upon the property of the company in the counties through which the telegraph was built, whereas said master ought to have *to* found and reported to this court that said Vane was not an employee of said company, and that said Vane did not acquire any lien whatever by virtue of any notice given by him upon the property of said company in any county or counties through which said lines were constructed in the State of Indiana or elsewhere under the laws of Indiana.

Second exception. For that said master has found and reported to this court that said Vane, intervener, in doing the work and services claimed by him to have been rendered and performed, as set forth in his petition, was an employee of said company within the meaning of section 5286 of the Revised Statutes of Indiana (acts 1881), and that said intervener filed his notice, as required by section 5287 of the Revised Statutes of Indiana, in the counties through which said telegraph lines were constructed, and that said liens cover the following items:

65

For stringing wires, etc., 248 miles, $45 per mile	$11,160 00	
" putting in cross-arms, &c., from Lake Station to Hammond	600 00	
For stringing 2 wires from Hammond to junction, &c.	560 00	
" extra work & delay	1,951 12	
	14,271 12	
Less credits	500	
Total		$13,771 12

Whereas said master ought to have found and reported to this court that said Vane was not an employee of said company within the meaning of said section 5286 of the Revised Statutes of Indiana; and that said Vane has no lien and did not acquire any lien whatever, by any notice or otherwise, within the meaning of said sections 5286 and 5287 of said statutes, for said items or either of them.

And that said Vane was a contractor in his agreement with the company and not an employee of same; and that said item of $600 for putting in cross-arms, &c., was not included in nor covered by his pretended notice of a lien, &c., nor by the agreement or
66 contract under which the labor was performed, and that for such services said Vane has no lien whatever.

And that said item of $1,951.12, for extra work, delay, &c., was not covered by or included in said pretended notice of a lien nor by the terms of said contract with said company, and that said Vane had no lien therefor.

Wherefore said Newcombe and Smith, as receivers aforesaid, except to said report of said master as aforesaid and humbly pray an appeal therefrom to the judgement of this honorable court.

RICHARD S. NEWCOMBE &
JAMES G. SMITH, *Receivers, &c.*,
By HARRISON, MILLER & ELAM, *Solicitors.*

And afterwards, to wit, at the November term of said court, on the 11th day of February, A. D. 1886, before the Honorable William A. Woods, judge, as aforesaid, of said court, the following further proceedings in the above-entitled cause were had, to wit:

Now comes James E. Vane, by Harris and Calkins, his counsel, and files his exceptions to the report of the master in chancery in the words following, to wit:

67 James E. Vane excepts to the master's report and finding herein filed in his matter on the 30th day of January, 1886, in this court, and for ground of exception thereto says:

First. For that said master has certified that he, said Vane, is not entitled to a lien on the property of said Bankers' & Merchants' Telegraph Company prior and paramount to the holders of receivers' certificates and prior and paramount to all other mortgage liens for the sum of $13,771.12, for work and labor done and performed for said company, under the lien laws of this State, whereas the master should have found and reported that said Vane was entitled to a prior and *permanent* lien over all of said other liens mentioned for the full sum found to be due him, to wit, the sum of $15,069.62.

Second. The master erred in deducting the payments of $500 from the amount found and reported to be a *permanent* lien over said receivers' certificates, whereas it his report concerning said amount is correct under the evidence he should have deducted said
68 payment from the $1,298.50, which he found and reported to be due from the Bankers' and Merchants' Telegraph Company, but which was entirely unsecured.

Third. The master erred in reporting and certifying that said

$1,298.50 was entirely unsecured, whereas he should have found and certified that said sum, together with all other sums found to be due, as shown on Exhibit No 1, filed with said petition, was either secured and paramount to said other liens under the mechanics' and employees' law of this State or was secured and was paramount to said other liens under his common-law lien, as shown by the evidence.

Fourth. The master found and reported that a part of said sum found to be due and owing to said Vane, to wit, the sum of $13,771.12, was secured by a lien under the statute of this State paramount to the lien of the receivers' certificates, whereas the master should have found and reported that the whole sum found to be due said
Vane, as shown on and by Exhibit No. 1, filed with the pe-
69 tition, was paramount to said lien of said receivers' certificates
by virtue of the agreement made with said receivers and by virtue of his possession, asserted and held against said receivers and all other persons, as shown by the undisputed testimony in said suit.

Wherefore said Vane excepts to said report of said master and humbly prays an appeal therefrom to the judgement of this honorable court.

JAMES E. VANE,
By HARRIS & CALKINS,
Solicitors, &c.

And afterwards, to wit, at the May term of said court, on the 6th day of May, A. D. 1886, before the Honorable William A. Woods, judge, as aforesaid, of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties complainant and defendant and comes now James E. Vane, intervening petitioner herein, and come also Richard S. Newcombe and James G. Smith, the receivers of the Bankers' & Merchants' Telegraph Company of New York.

And the court, being sufficiently advised in the premises,
70 doth now overrule the exceptions of said petitioner to the
report of William P. Fishback, master, filed herein, and doth also sustain so much of the exceptions of the said receivers to said report of the master as relate to the claim for a lien in favor of said petitioner as found by him, the said master, in said report, but confirms said report as to the amounts found to be due to said petitioner.

It is therefore ordered, adjudged, and decreed by the court that said James E. Vane, petitioner, has a just claim against the Bankers' and Merchants' Telegraph Company of New York for the amount found to be due him from said company by the master, being the sum of $15,069.62 *dollars*, and that he has a just claim against said receivers for work done for them as found by said master, amounting to the sum of $1,898.33 *dollars*.

And it is ordered, adjudged, and decreed by the court that said petitioner, James E. Vane, has no lien upon the property of said Telegraph Company, defendant, for the amount so found to be due

him or any part thereof, and that said sum of $15,069.62 is
71 a general floating debt of said contracting corporation not entitled to any priority in preference, and that said sum of $1,898.33 *dollars* is a valid debt of said receivers, payable out of any funds in their hands as such available for payment of the debts of said trust.

And now said petitioner, James E. Vane, prays an appeal to the supreme court from so much of said decree as disallows his claim for a lien for said sum of $15,069.62 *dollars*, and from the overruling of his exceptions to master's report and sustaining the exceptions of said receivers, which is granted upon his filing an appeal bond in the penalty of $500, with surety to be hereafter approved by the court.

And afterwards, to wit, at the May term of said court, on the 10th day of June, 1886, before the Honorable William A. Woods, judge, as aforesaid, of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now James E. Vane and files his appeal bond herein in the penalty of $500, conditioned as the law directs, with William N. Boone as surety thereon; and the court, being fully advised, approves said bond and surety.

72 Deposition- of witnesses produced and sworn *to* before me, a notary public of the State of New York, at my office, at No. 115 Broadway, in said city, county, and State of New York, on the 18th day of July, 1885, pursuant to the enclosed and annexed notice.

These depositions are taken on the part of the plaintiff in a certain action now pending in the United States circuit court for the district of Indiana, wherein James E. Vane is plaintiff and The Receivers of the Bankers' and Merchants' Telegraph Company are defendants.

Present: Edward T. Bartlett, Esq., of counsel for plaintiffs, and Henry J. Schenck, Esq., counsel for defendants.

JAMES G. SMITH, being duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, deposes and says as follows—being examined by Mr. BARTLETT on the part of the plaintiff:

Question first. Please state your name, age, residence, and occupation?

A. My name is James G. Smith. I am 49 years of age. I reside in New York city. I am by occupation an electrician. I am the receiver of the Bankers' & Merchants' Telegraph Company in Indiana and other States.

Q. When were you appointed a receiver of the Bankers' & Merchants' Telegraph Company.

73 A. In September or October, 1884.

Q. Are you acquainted with James E. Vane, the plaintiff in this action?

A. I am.

Q How long have you been acquainted with him?

A. Since the latter part of 1883.

Q. When you assumed your duty as receiver of the Bankers' & Merchants' Telegraph Company was the plaintiff connected in any way with that company, by contract or otherwise?

A. His position was that of contractor with the company, stringing wires upon the poles of the company from Freeport, Ohio, to Hammond, Indiana.

Q. At that time was the Bankers' & Merchants' Company indebted to him for work already performed prior to the receivership?

A. It was.

Q. Can you state about the amount of that indebtedness?

A. I cannot state it accurately without the original account, but I think it was in the neighborhood of $16,000.

Q. The plaintiff at that time presented his itemized account to the company, did he not?

A. I think not at that time.

Q. Did he subsequently?

A. I think he did subsequently.

Q. Was that account audited and allowed?

74 A. I think it was audited and approved. I can't say whether it was approved in full, but my impression is it was approved very close to the amount I have named.

(Witness shown Exhibit No. 1 in this case, filed March 7th, 1885.)

Q. I show you this account as filed in this action. Please look it over and see whether you are able to state from memory if this is a duplicate of the account rendered the company.

A. (Witness examined paper shown him.) I recognize, as I go through it, a great many things I know about, and some items I do not recall; but the total amount of the account seems to me to correspond with my recollection of his bill presented to the company.

Q. The original bill as presented and audited is now in the possession of the receivers of the company, is it not?

A. It was left with them—that is, the New York receiver. It was left with my successor in the New York receivership, Mr. James B. Butler.

Q. At the time you assumed your duties as receiver in the State of Indiana the plaintiff had not completed the line beyond Hammond, Indiana, had he?

A. I can't give you the exact status of the wires at that time. My recollection is that two of them—four of them, rather—were

75 completed to Hammond from Freeport. Two of them, I think, were incomplete for a considerable distance east of Hammond. I don't remember the point.

Q. What was the condition of the work between Hammond and Chicago?

A. My recollection is nothing was done west of Hammond.

Q. Could you tell if you had access to the files of the correspondence of the company with the plaintiff?

A. I think I could.

Q. Can you get access to the papers in the hands of the present receiver?

A. I don't know of any way except to request the receiver at New York to produce them.

Mr. Schenck states that the witness may examine the papers in the hands of the New York receiver.

Q. Were you one of the parties who audited this account, Exhibit No. 1, that has been shown you?

A. I was acting as assistant general manager of the company, with charge of construction work. My impression is that the account was not audited until after the receivership, but that I approved his account as assistant general manager; but I cannot state whether it was the account presented here; I think it was.

Q. That was an account aggregating about how much?

76 A. My recollection is that it was in the neighborhood of $16,000.

It is hereby consented by counsel on behalf of plaintiff and defendants that the further examination of this witness and the taking of testimony under the notice is hereby duly adjourned until Wednesday, July 22nd, 1885, at the hour of 2 o'clock p. m.

[SEAL.] CHARLES NETTLETON,
Notary Public for New York County in N. Y. City.

115 BROADWAY, NEW YORK CITY,
July 22d, 1885—2 o'clock p. m.

Present: Edward T. Bartlett, Esq., counsel for plaintiff, and the witness, James G. Smith; no one being present as counsel for the defendant.

The examination of the witness, JAMES G. SMITH, is now resumed and continued as follows—being further examined by Mr. BARTLETT on behalf of the plaintiff:

Q. Did you and your co-receiver, as receivers, make an arrangement with the plaintiff to complete the lines from Hammond, Indiana, to Chicago?

A. We accepted a proposition made by Mr. Vane to complete, I think, the six unfinished wires into Chicago from the points
77 at which they had been left by the stoppage of construction previous to the receivership.

Q. I show you Exhibit No. 2, on file in this action, and ask you if you recognize that as the account rendered by the plaintiff for the work done under this arrangement and credits for payment.

A. (Examining paper.) I do not remember that he ever rendered accounts for this work. I recognize that the payments for which he gives us credit are correct.

Q. Do you also recognize that the work for which he charges you is correct?

A. No, I do not recognize the statement shown me as being correct nor the balance shown, but I would not state that it is incorrect.

Q. What is your recollection for the amount that was to be paid plaintiff for the work under this new arrang-ment?

A. My impression is that the agreement with Mr. Vane was to pay him $3,500 for the work he proposed to do in his letter to us, and that we have paid him $2,500 of that amount.

Q. Are you able to state that the plaintiff did not advance money for freight on certain materials and for other purposes?

A. I think he did advance money for freight on materials to be used.

78 Q. That would have been in addition to the original contract price, would it not?

A. Yes, I think that would be in addition to his contract.

Q. Were you aware of the fact that in addition to his contract obligations Mr. Vane carried a gang of men on his pay-roll from December, 1884, until February, 1885, at his own expense, charging that amount to the company or its receivers?

A. I don't remember the fact.

Q. You are not able to swear that such is not the fact?

A. I am not at this moment.

Q. Were you aware that Mr. Stewart, the superintendent of construction, looked over this account, as set forth as Exhibit No. 2, just shown you, and certified the balance due to the plaintiff as $1,898.33?

A. No, I am not aware of that.

Q. You are not able to state that that amount is not due for services under this last contract and for extra sums advanced for various purposes?

A. I would not undertake to say at this moment that it was not due.

Q. Just prior to the time you, as receiver, made this last arrangement with the plaintiff he still had in his possession the wires, &c., that he had constructed from Freeport to Hammond?

A. I do not know that he had them in his possession. I
79 recollect that Mr. May stated that Mr. Vane claimed to have them in his possession in some form.

Q. Was it not the fact that plaintiff had grounded his wires at that time?

A. I don't know. It was so stated.

Q. Did you, as receivers, make some contract or writing with Mr. Vane prior to his surrendering his wires to the company or receivers?

A. We gave him a writing that the work we had contracted for him to do, including the connecting of the uncompleted wires to those he was about to put up, should not prejudice any rights he might have acquired previously.

Q. Was that writing by you and your co-receivers?

A. I think it was.

Q. And delivered it to the plaintiff?

A. My impression is it was sent to our attorney, Mr. Doolittle, at Chicago, to be delivered to the plaintiff.

JAS. G. SMITH.

No. 115 Broadway, New York City,
July 22nd, 1885.

It is hereby consented by counsel on behalf of plaintiff and defendants that the further taking of testimony under the notice is hereby duly adjourned until Monday, July 27th, 1885, at the hour of 2 o'clock p. m., at the same place.

[SEAL.] CHARLES NETTLETON,
Notary Public for N. Y. County in N. Y. City.

80 No. 115 Broadway, *July 27th*, 1885—2 o'clock p. m.

Present: Edward T. Bartlett, Esq., counsel for plaintiff; Henry J. Schenck, Esq., counsel for defendants; the witness, Robert Stewart.

Deposition of witnesses produced and sworn *to* before me, a notary public of the State of New York in and for the city and county of New York, at my office, at No. 115 Broadway, in said city, county, and State of New York, on the 27th day of July, 1885, pursuant to the enclosed and annexed notice.

These depositions are taken on the part of the plaintiff in a certain action now pending in the United States circuit court for the district of Indiana, wherein James E. Vane is plaintiff and the Receivers of the Bankers' & Merchants' Telegraph Company are defendants.

Present: Edward T. Bartlett, Esq., of counsel for plaintiff, and Henry J. Schenck, Esq., counsel for defendants.

Robert Stewart, being duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, deposes and says as follows—being examined by Mr. Bartlett on the part of the plaintiff:

81 Question first. Please state your name, age, residence, and occupation.

A. My name is Robert Stewart; I am 48 years of age; I reside in New York city; previous to July 10th, 1885, I was general superintendent of the Bankers' and Merchants' Telegraph Company.

Q. How long had you held that position?

A. Since January 28th or 29th, 1884, up to July 10th, 1885.

Q. Are you acquainted with James E. Vane, the plaintiff in this suit?

A. I am.

Q. How long have you known him?

A. Two years, about.

Q. What relation, if any, did Mr. Vane sustain to the Bankers' & Merchants' Telegraph Company.

A. He was superintendent of building a line between Freeport, Ohio, and Hammond, Indiana.

Q. Did the plaintiff afterwards enter into a contract with the company to string additional wires on this same line?

A. He did.

Q. When was that?

A. The latter part of June, 1884.

Q. Did he go on and complete the work under that contract?

A. He completed a larger portion of the work, and on account of some misunderstanding as to payment and non-delivery of
82 material and non-payment of freights he was compelled to cease work, and took possession of the wires by grounding the same.

Q. When was this?

A. Between the 1st of September and the first of October, 1884.

Q. (Witness shown Exhibit No. 1 filed in this case.) Examine and see if that is a duplicate of an account rendered you by the plaintiff for that work.

A. (Witness examining paper.) It seems to be correct as near as I can remember without having the original bills in my possession.

Q. Did you approve this bill as correct?

A. Yes, sir.

Q. Was it afterwards audited by the proper officers of the company?

A. I could not answer that question, as the bills were sent to the general office, in New York, but presume they were audited in due form by the assistant general manager, J. G. Smith.

Q. Under this contract where was the material to be delivered by the company to the contractor?

A. At the nearest points for distribution between Freeport, Ohio, and Hammond, Indiana, without charge.

Q. What was to be done with the gang of men that were then at work when he went in and took charge of this contract?

83 A. He was to take the old gangs of men and become their paymaster.

Q. What price was the plaintiff to have for doing this work?

A. He was to have seven dollars and a half per mile per wire, or forty-five dollars per mile for the six wires. Extra work, such as loops and placing the lines in good working order, he was to be paid outside of the contract for the same.

Q. As a matter of fact did the company deliver these materials at the points named and pay the freight in all instances?

A. No, sir.

Q. Did you, as an officer of the company, request the plaintiff to pay the various items of freight that appear in his bill already shown you?

A. Yes, sir.

Q. Did you, as superintendent of the company, request the plaintiff to furnish certain materials referred to in his bill already shown you?

A. Yes, sir.

Q. Did this failure of the company to furnish material and pay freights cause delays in the prosecution of the work?

A. It did, and increased the expense of the same. They were compelled frequently to bring material from the southern part of Illinois to keep the men at work, and we had to ship material back and forth along the line.

84 Q. In what manner did Mr. Vane, the plaintiff, perform his contract under your observation?

A. He used extra diligence in performing this work.

Q. Were any instructions given to him by the company as to keeping his gangs of men together; and, if so, what were they, as to paying board, or anything of that kind?

A. The only instructions given by me was that we expected funds and materials, and not to disband their gangs of men at present.

Q. Was not the company to pay the board of these men during the delay caused by the company's failure to furnish material and pay freight?

A. It is my understanding that they should do so.

Q. Were you aware of the terms of the arrangement that plaintiff made with the company under which he turned this work over to them?

A. After Mr. Vane had completed the majority of the work he seized the line and prevented the company from using the wires. He had some arrangement with the receivers, Newcome and Smith; the nature of it I could not state, but the wires were turned over to the company after this paper was signed.

85 Q. You say that the plaintiff rendered you an account substantially like Exhibit 1, which has been shown you. Where is that account now?

A. I don't know; I presume at No. 187 Broadway.

Q. To whom did you deliver that account after approving it?

A. James G. Smith, acting general manager.

Q. Since that time have you had it in your possession?

A. No, sir.

Q. The Mr. Smith you have referred to was also one of the receivers of the company, was he not?

A. He was.

Q. Has the company ever paid this bill, Exhibit 1, or any part thereof, to your knowledge?

A. I have no knowledge of its being paid—that is, the balance.

Q. Can you give the reason why the company did not pay that balance?

A. I presume on account of their financial embarrassment. I couldn't get any funds. I used to send for funds, and they refused to send me funds.

Q. Take the credits on this bill that Mr. Vane received—were they not paid to him by you as superintendent of the company?

A. I paid him some money, and some money they sent direct to him from New York and charged to my account, but the amount, considering the amount of the bill, was very small.

86 Q. After Messrs. Smith and Newcome came in as receivers did you continue to act — superintendent of the company?

A. I was continued in the employ of the company.

Q. Were you aware of an arrangement made with Mr. Vane, the plaintiff, to finish the work from Hammond to Chicago by the receivers? And, if so, state what the arrangement was.

A. The order for the completion of the wires was sent to James R. Doolittle, their counsel. I only know he was to proceed with the work.

Q. Do you know what Mr. Vane, the plaintiff, did in regard to that work between Hammond and Chicago and the bringing in of the 6 wires east of Hammond into Chicago? If so, state what it was.

A. He completed the six wires through to the city limits of Chicago.

Q. (Witness shown Exhibit No. 2 filed in this case.) I show you Exhibit No. 2 filed in this case and ask whether you have ever seen that account before, as rendered by the plaintiff to the receiver.

A. (Witness examined paper and states:) Yes; this seems to be, as near as I can remember, a copy of bill proved by me.

Q. This balance of $1,898.33 is due to plaintiff?

A. As near as I can remember without having the original bill?

87 Q. Were you aware, as superintendent of the company, of the expenditure of money paid and materials furnished, as set forth in this bill by Mr. Vane, the plaintiff?

A. I was aware of it.

Q. There are charges here for keeping gangs of laborers on during January and February. Were you aware of that being done?

A. That was done by my order, and the amount is correct. This was necessary, as we had tremendous sleet and snow storms, and the line of wires were covered continually. As we had no men at our disposal, we had to call on Mr. Vane and his men to do this work.

Q. Was this new work that was done between Hammond and Chicago connected with the old work east of Hammond?

A. It was. In fact, all of his work was done as agreed upon.

Q. Were you not aware of the fact that plaintiff had a stipulation with the receivers that the connecting of the new work with the old was to be without prejudice of the plaintiff's rights in the old work?

A. There was such a paper, and it was agreed upon by the receivers, and I think the paper was sent to Mr. Doolittle, their counsel, in Chicago, as near as I can remember.

88 Cross-examination:

Q. What position did you hold with the Bankers' and Merchants' Telegraph Company before the appointment of the receivers?

A. General superintendent.

Q. How long did you remain with the receivers?

A. Up to July the 10th, 1885.

Q. When did you cease to actively work for the receivers of the B. & M. Co.?

A. After July 10th, 1885.

Q. What was the last thing you did for the B. & M. Co. immediately prior to the date you have just mentioned?

A. I had charge of their interest in Chicago.

Q. Up to what time have you been paid by the receivers of the Bankers' & Merchants' Company?

A. The nearest I can remember I received some money on account last February.

Q. (Question repeated.) Up to what time have you been paid in full by the Bankers' & Merchants' Company?

A. I have never been paid in full.

Q. What was the last time you were paid by them?

A. I received some money in February on account. I have never been paid in full.

Q. You understood you were discharged, did you not?

A. I never so understood.

89 Q. Were you not notified by some one that you were discharged?

A. No, sir.

Q. Did you actively render services for the B. & M. from February last to July, 1885, without receiving any compensation?

A. Yes, sir.

Q. Can you specify some of the work that you did during that period?

A. I remained in Chicago, I think, until about the 1st of May looking after the Bankers' & Merchants' interest and as their superintendent.

Q. Was not a man named Parker their superintendent at that time?

A. No, sir.

Q. And for that time you did not receive any salary, did you?

A. I received some money on account in February, but not since, as I remember.

Q. Who was the Chicago superintendent of the B. & M. up to 1st of May last?

A. I was.

Q. Are you now in the employ of the Western Union; and, if so, how long have you been in their employ?

A. I decline to answer.

Q. Did you not take part in the late raid that was made by the Western Union Tel. Co. on the Bankers' & Merchants' Company?

A. I decline to answer.

90 Q. Are you not inimicable to the Bankers' & Merchants' Tel. Co. or to some person interested in it?

A. I decline to answer.

Q. Were you present during the whole time this work by Mr. Vane was in progress?

A. Yes, sir; with the exception of about two weeks.

Q. Do you mean to say that you were on the ground all the time, with that exception?

A. No, sir; I was not; that is not necessary for an officer, to be on the ground, but I was over it several times.

Q. Where were you most of the time when this work was going on?

A. Chicago.

Q. And how many miles is Chicago from the scene of these operations?

A. 230 miles, and they gradually lessened until they neared Chicago. Hammond is only 28 miles from Chicago.

Q. This work of Mr. Vane's consisted of stringing wires from what point to what point?

A. From Freeport to Chicago through Hammond, and putting on arms, stringing six wires.

Q. Was the original agreement between Vane and the B. & M. Company in writing?

A. Yes; it was a telegram from Mr. Mott to me for me to instruct Vane to do the work, figures named, which was $45
91 per mile for six wires, or $7.50 per single wire.

Q. Have you that telegram?

A. The telegram, I presume, is among my papers.

Q. Who was Mr. Mott?

A. He was general manager of the B. & M. Company.

Q. You went over the line when the work was done?

A. Yes, sir; I did.

Q. Have you any interest in this controversy?

A. Not in the least.

Q. Has any arrangement been made with you, directly or indirectly, that you shall receive any of the proceeds of these sums?

A. No, sir.

Q. How many times were you present at the place where the work was going on during its progress?

A. Probably a dozen times, and, in addition, I had my inspectors to report.

Q. Did you ever examine the plaintiff's bills for work before the appointment of the receivers?

A. Yes, sir; and approved the same and sent them to Mr. Smith, the receivers.

Q. Look at Exhibit No. 1 and see if it represents the work that plaintiff did before the appointment of the receivers.

A. I think Exhibit No. 1 is correct.

Q. You do not remember positively that is correct?

A. Not each item, but the sum total, I think, is correct.

92 Q. Do you know how much was paid on that bill, Exhibit No. 1?

A. No, sir.

Q. Therefore you do not know that the credits as therein stated are correct?

A. No, sir; I do not know as to the amount, as sometimes money would be sent direct to Vane and sometimes to myself, but the total amount was charged to my account.

Q. I understand you to say that Exhibit No. 1 is made up of numerous bills which the plaintiff represented to the B. & M. Company. Is that it?

A. Yes, sir.
Q. To whom did he present those bills?
A. To me.
Q. In every instance?
A. Yes, sir.
Q. And what did you do with them?
A. Upon examination, approved of them if I found them correct and sent them to J. G. Smith, general manager.
Q. Before you approved these bill did you visit the scene of operation and examine the work?
A. In some cases I did and in others I had inspectors.

ROBERT STEWART.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

93 I, Charles Nettleton, a duly authorized notary public within and for said county of New York, State of New York, duly commissioned and sworn, and residing in said city of New York, do hereby certify that the above James G. Smith and Robert Stewart, witnesses, were by me first duly sworn according to law to testify the truth, the whole truth, and nothing but the truth relating to said cause; that their depositions were reduced to writing by E. J. Bunker, a clerk in my office appointed by me for that purpose, in my presence and under my direction and in the presence of the witness and counsel present, who is a disinterested third person, not of kin, counsel, or attorney or in any manner interested in the event of this suit; that the said plaintiff was present at the taking of said depositions, by his attorney, Edward T. Bartlett, Esq., and the defendants were present at the taking of said depositions, by Henry J. Schenck, Esq., their attorney, and said deposition of James G. Smith was commenced on the 18th day of July, 1885, at my office, in the caption stated, and was completed on the 22nd day of July, 1885, and said deposition of Robert Stewart was taken & completed on July 27th, 1885, the adjournments therein stated having been by direct consent of counsel present. Said depositions were taken at my office, No. 115 Broadway, in said city, county, and State of New York, on the 18th, 22nd, & 27th days of July, 1885, between the hours of 8 o'clock a. m. and 6 o'clock p. m. of those days, respectively.

94 And I further certify that I am not of kin or counsel to either of the parties to the before-mentioned cause; neither am I in any way interested therein.

In testimony whereof I have hereunto set my hand and affixed my notarial seal on this 27th day of July, A. D. 1885, at my office, in said city, county, and State of New York.

[SEAL.] CHARLES NETTLETON,
Notary Public for the City & County of New York,
in the State of New York.

95 Before Hon. W. P. Fishback, master.

JAMES E. VANE, being first duly sworn, testified as follows:

Direct examination by Mr. CALKINS:

1 Q. State your name, age, residence, and occupation.

A. 41 years old. My occupation for the last five years has been telegraph superintendent most of the time. I reside in Kalamazoo, Michigan.

2 Q. You are the petitioner or plaintiff in this case against the receivers of the Bankers' & Merchants' Telegraph Company, are you?

A. Yes, sir.

3 Q. State what employment you were engaged in just prior to your connection with the Bankers' & Merchants' Telegraph Co.

A. Back of that I was in the employ of the American Rapid Telegraph Co., as superintendent of construction.

4 Q. About what time did your connection with them begin?

A. With the Michigan Rapid?

5 Q. Yes, sir.

A. Nearly five years ago.

6 Q. What did you do?

A. I was superintendent of construction.

7 Q. When did your connection commence with the Bankers' & Merchants' Telegraph Co.?

A. When they absorbed the American Rapid by mutual agreement, which I think was in August, 1883.

Int. 8. Did you have any connection with the construction company called the Bankers' & Merchants' Construction Company, I believe?

96 A. I did; yes, sir.

Int. 9. What connection did you have?

A. I was superintendent of construction for them for the line from Freeport, Ohio, to Hammond, Indiana.

Int. 10. What was the position you held with them?

A. Superintendent of construction.

Int. 11. Where were you engaged; on what part of the line?

A. From Freeport, Ohio, to Chicago, Illinois.

Int. 12. State in a general way what connection the construction company had with the building of the lines of the Bankers' and Merchants' Telegraph Co.

A. They had a contract with the Empire Construction Company to build fifteen hundred miles of line.

Mr. MILLER: That contract was in writing, was it not?

The WITNESS: Yes, sir.

Int. 13. Do not state the terms of the contract, but state what they did.

A. They employed me, I think it was, January 1st, 1884, to take charge of the building of this line on account of wanting to push it through in a certain length of time. The B. & M. folks wished me to take charge of it on account of knowing me, I suppose.

Int. 14. When you say the B. & M. folks you mean the Bankers' & Merchants' Telegraph Co.?

97 A. Yes, sir; the officers of the Bankers' & Merchants' Telegraph Co. We proceeded to do the work. I think it was by special request of Mr. Dimock and Mr. Mott, the general manager, and Mr. A. G. Smith, the assistant general manager, to push the lines through to Chicago as fast as possible, and we proceeded to do so under my direction, I buying the material and working the men in building the line from Freeport to Hammond.

15 Q. What I want you to state is what part of the line you were connected with under the construction company and when you severed your connection with the construction Co.

A. Under our contract we were to build a 30-foot pole line with four wires on it for the B. & M. Telegraph Co. between Freeport and Hammond; it was from Chicago, but under a mutual agreement they built from Hammond to Chicago—and to push it through as fast as possible to get the connection.

16 Q. When did you sever your connection with them?

A. I think about the 8th of May, 1884. I think the work was finished about the 9th, but the lines were not formally turned over to the Bankers' and Merchants' Telegraph Co. until about the 15th.

17 Q. Of what month?

98 A. Of May.

18 Q. Describe the line as finished by the construction company and turned over on the 15th of May.

A. It was four continuous wires, with offices cut in and opened and ready for use. That part was done by the company, and they employed men for that; that was not the Banker Company, but the telegraph construction company. It was a four-wire line complete from Freeport to Hammond—two No. 6 and 2 No. 8 placed on a four-pin cross-beam at the top of the pole.

19 Q. About how far is it from Freeport, Ohio, to Hammond, Indiana?

A. About 265 miles. It was 265 or 365 miles.

20 Q. As we are not familiar with the terms which you use, I will ask you to explain what you mean by cutting in the offices.

A. It is to run the wires from the office window to the switch-board and to connect the wires from the switch-board to the instrument and setting up the instrument and putting in a local battery.

21 Q. You refer to cutting into the local offices along the line?

A. Yes, sir.

22 Q. State how many wires were strung on those poles under your superintendency between the points named.

A. Four wires—2 No. 6 and 2 No. 8.

99 23 Q. Describe them.

A. No. 6 is a larger-sized wire than No. 8, and there is more conductivity to it. It weighs 580 pounds to the mile, and No. 8 is less than that.

24 Q. Now, on the 15th of May you say it was turned over to

the Bankers' & Merchants' Telegraph Co. Will you state by whom it was turned over?

A. By me, as superintendent of construction, in going over the line with one of the superintendents of the Bankers' & Merchants' Company and making a final inspection. We drove the whole length of the line with a team.

25 Q. You acted for whom?

A. I was acting for the Bankers' & Merchants' Telegraph Construction Company.

26 Q. And the superintendent with whom you were was acting for whom?

A. He was acting for the Bankers' & Merchants' Telegraph Co.

27 Q. What connection, if any, did you have with the Bankers' & Merchants' Telegraph Co. about the 15th of May in constructing other lines for it?

A. I was working for them in Chicago on the under-ground line and running out and cutting in different offices.

28 Q. Between what times were you thus employed?

A. It was from the 1st of June until the 15th of June.

100 29 Q. On the 15th of June what were you engaged in?

A. I had a vacation and went to Michigan for a few days.

30 Q. After the 15th of June what employment or contract did you have with the Bankers' & Merchants' Telegraph Co. with respect to a contract between Freeport and Hammond?

A. On the 17th of June, at Ionia, Michigan, I received a message from Robert Stewart. (Witness produced message and handed it to Mr. Miller.)

31 Q. What did you do when you received that message from Mr. Stewart?

A. I took the first train for Chicago.

32 Q. When you got to Chicago did you find any other message?

A. Mr. Stewart handed me a message he got from Mr. Mott.

33 Q. Is this the message (handing witness message)?

A. Yes, sir.

Mr. CALKINS: I offer the two messages and ask to have the stenographer mark them "A" and "B." The two messages are as follows:

"B."

DATED CHICAGO, *June* 17, 1884.

To J. E. Vane, c. o. T. F. Barringer:

Come to Chicago first train; your proposition accepted.

R. STEWART.

"A."

DATED NEW YORK, —— 17, —.

To R. Stewart:

101 Let Vane have the stringing work at prices named, with the understanding that he shall place the line — good order as he goes along.

E. A. MOTT.

34 Q. I notice in the telegram marked "A" the words occur, "Let Vane have the stringing work at the prices named, with the understanding that he shall place the line in good order as he goes along." Had your proposition to the company been submitted in writing before this?

A. It had, in a general way, to J. G. Smith, assistant general manager; in two letters there were two proposals.

35 Q. What position did Mr. Robert Stewart have with the Bankers' & Merchants' Telegraph Co.?

A. He was general superintendent of the Western Division of the Bankers' & Merchants' Telegraph Co., with headquarters at Chicago.

36 Q. What conversation did you have with Mr. Stewart with reference to your contract at the time you went to Chicago to see him in answer to this telegram which has been introduced?

A. When I first arrived in Chicago he said, "Well, Vane, you did not have much vacation, did you? You got back pretty quick."

37 Q. Confine yourself to the proposals.

A. He said, Your proposal is accepted to put up those six wires for us for the $45.00 per mile.

102 Mr. MILLER: I am objecting to this. That contract was either in writing or it was not.

Mr. CALKINS: It was partly in writing and partly oral.

Mr. MILLER: Then it is not a written contract at all.

Mr. CALKINS: We do not claim it is.

Mr. MILLER: I object to it.

38 Q. State what he said in reference to the contract and what you said in reference to the contract there to Stewart.

A. Mr. Stewart, as I said before, accepted my proposition at 45 dollars per mile, and said, "You to do the work and we to furnish the necessary material and everything in the shape of material at the nearest point of delivery free of charge to you, we to pay the freight and furnish you material promptly. The material now is, is nearly one-half of it, on the ground and the other will be promptly, for our folks want to get the wire through as quick as possible, and we will use our best endeavor to have the material promptly on hand."

39 Q. Was there anything talked of between you and Stewart as to the number of gangs of men?

A. He wanted to know how many gangs of men I would use and put on, and I told him at first two gangs would be enough, and he said, You cannot get it through fast enough
103 with two; and I said, If two will not do we will put on four.

40 Q. Was anything said about the time you were to receive your pay as you went along?

A. At the end of each month for that much.

41 Q. What did the $45.00 per mile include?

A. It included stringing 4 No. 6 wires and 2 No. 8; putting the cross-arms on and insulators, and then putting the wires on.

42 Q. Did it include cutting into those local offices along the line?

A. Yes, sir.

43 Q. What else did the $45.00 per mile include?

A. It did not include anything else but the stringers and the wire.

44 Q. Was there anything else said between you and Stewart about the work that had already been done on the line?

A. He said he had a gang of men out, and there was some fifteen or twenty miles of cross-arms put on, and he said they would throw in that work and they would turn that gang over and let me have that gang, and he sent his superintendent of construction with me and turned that gang over to me.

45 Q. I will ask you whether each wire that you were putting on was to be an independent wire, disconnected from the other wires?

104 A. The other four?

46 Q. The other four.

A. Each wire is independent on a line.

47 Q. Each wire was then to become what?

A. An independent wire through.

48 Q. An independent through wire?

A. Yes, sir.

49 Q. On whose poles were these put?

A. On the poles of the Bankers' & Merchants' Telegraph Co.

50 Q. On what cross-arms were they strung—on those that were already on the poles or on others put on by you?

A. Of those I put on, with the exception of this fifteen or twenty miles they had up.

51 Q. And that was thrown in and you were not to be charged up with that in consideration of your contract?

A. That is correct.

52 Q. You may state whether these six independent wires increased the value of that line as a whole.

A. Most assurdly they did. If one line was worth to them to rent $20,000 a year ten wires would be worth more than four.

Mr. CALKINS: For the purpose of fixing some dates I offer in evidence the order of the supreme court of N. Y. appointing the receivers in this case, or so much of the record as is on file in

105 this case, and also the date of the order authorizing the receivers' certificates to be issued and making them a lien on the line; that date is November 3rd, 1884.

53 Q. You may state whether you were in any way connected with the construction company in putting these four wires on the poles which you have spoken of.

A. No, sir; this construction company had finished that line and turned it over to the Bankers' and Merchants' Telegraph Co. long before.

54 Q. You were acting independent of the construction company?

A. Yes, sir.

55 Q. Entirely?
A. Yes, sir.
56 Q. And had no connection with them?
A. Not any.
57 Q. What time did you begin the work under this contract with the Bankers' & Merchants' Company to string the wires on the pole-?
A. (Referring to the book.) June 19th, 1884, was the time they were turned over to me.
58 Q. How many gangs of men did you have at work on the 19th?
A. I started one gang with twenty, and it was two or three days after that when I started two more gangs. I started them as soon as I could get the men in. I left that night and started
106 that gang, and went from there to Portage, Ohio, and commenced picking up men and getting them together, and started from there.
58 Q. How many gangs of men did you put to work on that line from the time you first commenced until you reached the highest number?
A. I ran four gangs.
59 Q. How many men in a gang?
A. From 12 to 20.
60 Q. Which way did you work generally?
A. Generally from the east towards the west.
61 Q. What time did you complete the lines to Lake Station?
A. That was the latter part of September.
62 Q. How many wires were put upon the poles to Lake Station?
A. From Freeport Junction to Lake Station I had six.
63 Q. How far is it from Lake Station to Hammond?
A. About 30 or 33 miles.
64 Q. How long was it before you completed the stringing of the wires to Hammond?
A. They were not completed because I could not complete them; I had no material to do it with.
65 Q. Did you ever complete them?
A. Yes, sir.
66 Q. Did you complete them before the 23rd day of September, 1884?
107 A. No, sir; not the six wires.
67 Q. What was completed on the 23rd day of September, 1884—I mean so far as the stringing is concerned?
A. I did not get quite done on September 23rd; I did not finish until the last of the month.
68 Q. What time did you get notice of the appointment of the receivers?
A. I think that was the 23rd or 24th. Mr. Stewart told me.
69 Q. What was completed at that time?
A. The six wires were completed to Lake Station and the four

completed from Lake Station to Hammond. I dropped two on account of not having that size wire.

70 Q. And it was thirty miles further west to Hammond from Lake?

A. Yes, sir.

71 Q. As I understand you, all six were strung to Lake Station and four were strung to Hammond?

A. Yes, sir.

72 Q. Was that done when you got notice of the appointment of the receivers?

A. Not quite finished.

73 Q. You may state what possession, if any, you held or kept of those wires after you completed them.

A. I did not turn them over to the company; I never had connected them with the main office.

108 74 Q. What did you do with the west end of the wire?

A. I grounded it.

75 Q. What did you do?

A. They were cut off and the ends joined together and wrapped and run down to the ground, and there was a wire laid to the ground — if there was a battery put on it, so they could not be worked if they should slip in and put on a battery and try and work it; and they would have been grounded there.

76 Q. Then, if I understand you, they were absolutely of no account for telegraphing in that condition?

A. No, sir.

77 Q. What, if anything, did you do at Kendallville or near Kendallville in putting in a loop, and what authority did you have to put that in?

A. I had authority from Mr. Stewart to run a loop up to the town.

78 Q. How far was that?

A. 14 poles.

79 Q. How far apart?

A. Thirty-five to — mile.

80 Q. State whether that was expressed in your original contract or whether that was extra.

A. No, sir; it was not in the original contract.

81 Q. Was that authority from Mr. Stewart in writing or oral?

109 A. Oral.

82 Q. State what authority he gave you.

A. He told me he had authority from New York to have me run a loop into Kendallville. He said he had telegraphed to Mr. Smith and Mr. Mott and they had authorized him to have it built in for a test office there.

83 Q. What did he say with reference to compensating you for that?

A. I was to be paid for material and labor.

84 Q. Was there any price agreed upon between you about how you were to be paid?

A. That we agreed upon when he certified to the bill. I showed him the bill, what the material cost me, and how much time I put in, and he approved the bill.

85 Q. Did you attach any of these six wires to local offices along that line?

A. No, sir; I did not at that time.

86 Q. What time was this work at Kendallville done—before or after the receivership?

A. Before the receivership.

87 Q. Were they attached to the local offices at the time you got word of the appointment of the receivers?

A. No, sir.

88 Q. State how they were fixed by you with reference to the attachment—cutting in, you call it.

110 A. Some of them were run to the office windows, and I ran the operating wires up to the window and I connected the outside ones to them, and at other offices they were left on the poles away from the office, in a coil, the same as this hanging out here (witness referring to wires on the street). There was wire enough there to reach to the office when I got ready to put them in.

89 Q. What was the condition of these six wires at the time of the appointment of these receivers?

A. The condition was that there were two of them tied together around a pole and were grounded at Lake Station, or about two hundred poles east of Lake Station, and the other four were grounded at Hammond.

90 Q. As to the local offices?

A. They were not cut into any of the local offices.

91 Q. And as to the local offices, they were in the condition you have just described?

A. Yes, sir.

92 Q. State whether you were solicited—and, if you were, by whom—to yield the possession of those wires and connect them.

A. There was a pool formed after the receivers were appointed, and Mr. Parker was the superintendent and managing it, and after Mr. Zeublin went out Mr. Parker wanted to use them, and I told him I could not let them be used.

111 93 Q. Why?

A. Because I would be giving up my possession of them.

94 Q. Why were you holding possession?

A. Because I was afraid I would not get my pay.

95 Q. Were you solicited by any other person or persons to deliver possession of the wires; and, if so, by whom?

A. Mr. Patten, the manager in Chicago, wanted to use them when some of the others were down.

96 Q. Who was Mr. Patten?

A. He was the manager of the Chicago office from the pool office.

97 Q. Were you solicited by Mr. Doolittle?

A. Not at that time.

98 Q. Were you subsequently?

A. Yes, sir.

99 Q. Who did Mr. Doolittle represent?
A. The receivers.
100 Q. He was the attorney of the receivers?
A. Yes, sir.

Mr. CALKINS: For the purpose of proving that I will at this point introduce the following letters from Mr. Doolittle and the following dispatches from the receivers, Exhibits "C," "D," "E," and "F."

Mr. CALKINS: I also introduce the letters to show the authority for the contract hereafter to be mentioned.

"C."

DATED NEW YORK, *Nov.* 6, 1884.

To J. E. Vane:

Telegraph to James R. Doolittle, Jr., Chicago, and ask him
112 if wire and Peoria cable has been released. If so, you can at once go to work.

NEWCOMBE & SMITH, *Receivers.*

"D."

CHICAGO, ILL., *Nov.* 26, 1884.

MY DEAR SIR: Receivers have authorized changing cross-arms and urge the work at the greatest speed. Put on every available man you can get. Had we better not get Hopkins at work, too? Have telegraphed for cross-arms to St. Louis.

Yours, DOOLITTLE.

J. E. Vane, Blue Island.

"E."

CHICAGO, ILL., *Oct.* 21, 1884.

MY DEAR SIR: Yours of the 19th is at hand. Nothing definite has come yet. You had better make up a list of all your labor bills and be prepared to present it.

It will not be necessary for you to be here before or on the first Monday of Nov. That is a mere form. I will see to it that no disadvantage results to you, whether you are here or not. You had better be at home election day and save your country.

Yours truly, J. R. DOOLITTLE.

J. E. Vane, Esq., Kalamazoo, Mich.

113 "F."

DATED CHICAGO, *Nov.* 8, 1884.

To J. E. Vane:

Come here at the earliest practicable time. Answer.

J. R. DOOLITTLE, JR.

101 Q. I will ask you to look at the paper which I hand you and state whether or not it was given to you in pursuance of the contract which seems to be indicated in it (handing witness paper).

A. In response to that telegram, when I arrived in Chicago and found Mr. Doolittle, I went to his office and met him, and he says, "Here, Vane, I never leave any bars down and I want this thing secured; I want you to sign this contract," and I said, "Mr. Doolittle, there never has been any such thing as that in my correspondence with the receivers," and he said, "You may claim when you get the wires from Chicago to Hammond you won't connect," and he says, "We want some guarantee if we expend some fifteen or twenty thousand dollars to extend these wires to Hammond that we can have the use of those that you have."

102 Q. What did you tell him?

A. I told him from the start that I had no agreement to do it.

103 Q. What did it culminate in, and what was the determination of it?

114 A. The determination of it was I went to New York to find out about it. I was instructed in the meantime to go on and do the work.

104 Q. What work were you engaged at?

A. Stringing the wires from the cable pole to Hammond to meet these wires.

105 Q. That was under your contract with the receivers?

A. Yes, sir.

106 Q. What was the determination of this agreement which I put in your hand and by you accepted? How came you to accept it?

A. I accepted it upon the receivers signing it.

107 Q. State whether at the time this was signed you still had possession of those wires.

A. Yes, sir.

108 Q. State whether or not you had refused to deliver them to the receivers.

A. I had, sir.

109 Q. State whether or not you delivered them afterwards, and why you delivered them.

A. I delivered them afterwards upon this contract.

110 Q. The one to which we have just been referring?

A. Yes, sir.

111 Q. Was that the inducing cause?

A. Yes, sir; that they would protect me.

Mr. CALKINS: I will put them in, "Exhibits G and H."

115 "G."

CHICAGO, ILL., *Nov. 12th*, 1884.

It is hereby agreed and understood that the telegraph wires on the poles of the Bankers' and Merchants' Telegraph Company in the State of Indiana, which were strung by J. E. Vane and upon which he claims a lien, shall be connected up with the wires of the said company from Hammond, Indiana, to Chicago, Illinois, now constructed and to be constructed, and shall be used for telegraphic business by the receivers of said company; but it is also expressly understood that

such use of said wires shall not be construed in any way or to any extent as impairing or interfering with the lien of said Vane thereon.

RICHARD S. NEWCOMBE,
JAS. G. SMITH, *Receivers.*

"H."

Nov. 20TH, 1884.

To J. E. Vane, Hammond, Ind.:

The agreement which I drew up has been signed by receivers and returned to me. When will you be in? The St. Louis cross-arms will be shipped as you wish.

J. R. DOOLITTLE, JR.

Mr. MILLER: Are you claiming anything for work done after the receivership or only for work done for the company?

Mr. CALKINS: For both.

116 Mr. CALKINS: At this point I will put in the following original mechanics' liens, with the endorsement of the recording by the recorders of each of the different counties.

Mr. MILLER: They can go in subject to an objection. I do not think he occupies a relation that brings him within the provision of the statute, and I object to them for that reason. The statute provides for a lien for employees, and I say that does not cover a lien of this kind.

"EXHIBITS I, J, K, L, M, N, AND O."

"I."

Mechanics' Lien.

Rec'd for record Sep. 19, 1884, 11 a. m., and recorded in Mechanics' Lien Record No. 1, page 127.

RICHARD W. PRICE,
Recorder, Lake Co., Indiana.

"I."

Notice is hereby given to the Bankers' and Merchants' Telegraph Company, incorporated and organized under the laws of the State of New York, doing business in the county of Lake, in the State of Indiana, and all others interested:

You are hereby notified that I, James E. Vane, intend to hold a lien upon the poles and wires strung thereon, the switch-boards, telegraph instruments and batteries, and all other fixtures and property, together with all the earnings of said company in said

117 county of Lake. I hold this lien for work and labor done and performed and materials furnished in the construction of their line of telegraph through said county for said company and at their special instance and request for the sum of sixteen thousand

dollars ($16,000). The labor was performed and materials furnished on and after the fifteenth day of June, 1884; that he intends to hold this lien upon all the poles, wire, strung or unstrung, in rolls or bails, switch-boards, telegraph instruments and batteries, whether in use or not, and all other fixtures and property belonging to said company in said county, together with all the earnings thereof, until his claim is paid and satisfied.

Sept. 15, 1884.

JAMES E. VANE.

"J."

Notice of Mechanics' Lien.

Received for record this 19th day of September, 1884, at 8 o'clock a. m., and recorded in Mechanics' Lien Record No. 2, on page 133.

WM. C. WELLS,
Recorder of Porter Co., Indiana.

Notice is hereby given to the Bankers' and Merchants' Telegraph Company, incorporated and organized under the laws of the State of New York, doing business in the State of Indiana, in
118 Porter county, in said State, and all others interested:

You are hereby notified that I, James E. Vane, hereby intend to hold a lien upon the poles and wires strung thereon, the switch-boards, telegraph instruments and batteries, and all other fixtures and property, together with all the earnings of said company, in said county of Porter. I hold this lien for work and labor done and performed and materials furnished in the construction of their line of telegraph through said county for said company and at their special instance and request for the sum of sixteen thousand dollars. The labor was performed and materials furnished on and after the fifteenth day of June, 1884; that he intends to hold this lien upon all the poles, wire, strung and unstrung, in roles or bails, switch-boards, telegraph instruments and batteries, whether in use or not, and all other fixtures and property belonging to said company in said county, together with all the earnings thereof, until his claim is paid and satisfied.

September 15th, 1884.

JAMES E. VANE.

"K."

James E. Vane. Lien.

STATE OF INDIANA, *La Porte County:*

Filed for record at 11 o'clock a. m. September 18, 1884,
119 and recorded in Miscellaneous Record No. 4, on page 120.

D. J. McMURRAY, *R., C. L.*

Notice is hereby given to the Bankers' and Merchants' Telegraph Company, incorporated and organized under the laws of the State of New York, doing business in the State of Indiana, in the county of La Porte, and all others interested:

You are hereby notified that I, James E. Vane, hereby intend to hold a lien upon the poles and wires strung thereon, the switch-boards, telegraph instruments and batteries, and all other fixtures and property, together with all the earnings of said *county*, in the county of La Porte. I hold this lien for work and labor done and performed and materials furnished in the construction of their line of telegraph through said county for said company and at their special instance and request for the sum of sixteen thousand dollars ($16,000). The labor was performed and materials furnished on and after the fifteenth day of June, 1884; that he intends to hold this lien upon all the poles, wire, strung and unstrung, switch-boards, telegraph instruments & batteries, whether in use or not, and all other fixtures and property belonging to said company in said county, together with the earnings thereof, until his claim is paid and satisfied.

Sept. 15th, 1884.

JAMES E. VANE.

120 "L."

Mechanics' Lien.

Received for record this 18th day of September, 1884, at 1 o'clock p. m., and recorded in Miscellaneous Record D, on page 303.

T. M. HOWARD,
Recorder, St. Joseph County.

Notice is hereby given to the Bankers' and Merchants' Telegraph Company, incorporated and organized under the laws of New York, doing business in the county of St. Joseph, in the State of Indiana, and all others interested:

You are hereby notified that I, James E. Vane, hereby intend to hold a lien upon the poles and wires strung thereon, the switch-boards, telegraph instruments and batteries, and all other fixtures and property of said company, together with the earnings of said company, in said county of St. Joseph. I hold this lien for work and labor done and performed and materials furnished in the construction of this line of telegraph through said county and at their special instance and request to the amount of sixteen thousand dollars ($16,000). The labor was performed and materials furnished on and after the fifteenth day of June, 1884; that he intends to hold this lien upon all the poles, wire, strung and unstrung, switch-
boards, telegraph instruments and batteries, whether in use
121 or not, in said county of St. Joseph, with the earnings thereof, until his claim is paid and satisfied.

September 15, 1884.

JAMES E. VANE.

"M."

Received for record Sept. 18, 1884, at 2 o'clock p. m. Recorded in Miscellaneous Record No. 3, at page 505.

J. W. KOONTZ, *R., E. C.*

A. It does upon the receivers' account.

114 Q. You applied that $1,000 upon the receivers' account?

A. Yes, sir.

115 Q. And Mr. Doolittle handed you $1,000 to apply on the back account?

A. The receipt I signed for $1,000 read that way: "On account of construction from Freeport to Chicago."

Mr. MILLER: Your balance is $15,069.52, not counting that?

The WITNESS: I did not count that.

Mr. MILLER: The balance of the old account is $15,069.52, not crediting the old account with that?

126 The WITNESS: Yes, sir; I thought it was an error at that time, and I did not put it in my books in that way.

116 Q. Will you state to the master whether the items which appear upon this account were submitted to Mr. Stewart, the superintendent: and, if so, what, if anything, was done by him with reference to that?

A. Part of them were turned over to Mr. Stewart at various times, and I got credit for them from him while he was superintendent for the telegraph company, and on or about the 2nd or 3rd day of October he came to Chicago and wanted I should make out all my bills. He was then representing the receivers, and then and there, in Mr. Doolittle's office, he accepted and signed all my bills.

117 Q. What do you mean by accepting and signing?

A. He approved them as superintendent for the receivers or the receivers' agent.

118 Q. What became of them?

A. They were sent to New York, to the receivers.

119 Q. Are those the bills you asked them to produce the other day?

A. Yes, sir.

120 Q. How did the bills differ in amount from these?

127 A. They did not differ in amount from these. The sum total was the same.

121 Q. The sum total of your indebtedness appears the same on this bill that he approved as they do on these?

A. Yes, sir—no. I beg your pardon.

121½ Q. I mean the company's indebtedness to you.

A. On those bills it did not, because there was some of the freight bills I turned over before. At the end of each month I turned over bills I had in the month previous and I would get credit for them.

122 Q. What I want to know is the fact whether the sum- total on the bills are the same.

A. That he approved?

123 Q. And that were sent in to the company showing their indebtedness to you to be what this exhibit shows.

A. Here is a copy of those that he signed just as he signed them—each bill.

124 Q. I am asking you about the total.

A. I want to know whether you think I mean that I turned in

those bills that were previously turned over and he signed them, because he did not, because those had gone in before.

125 Q. Those had been signed before?

A. Yes, sir.

126 Q. They had preceded the final one?

A. Yes, sir.

127 Q. And the total amount was the same?

128 A. Yes, sir.

128 Q. You now look upon "Exhibit No. 2" filed with your petition and state what that represents.

A. That represents the work that was done for the receivers and the money which was paid on account of that work and the balance that was due.

129 Q. Now, you may state what arrangement or contract you had with the receivers after they were appointed to do or perform any work on that line.

A. The receivers wrote to me in Kalamazoo to know what I would do the work for—to string six wires from Hammond to Chicago and finish them. They were in an unfinished condition, you know.

130 Q. State whether this is the letter you refer to (calling witness' attention to letter).

A. Yes, sir.

Mr. CALKINS: I offer the following *the following* two letters. (The letters were marked "P" and "Q" by the reporter and are as follows:)

"P."

NEW YORK, *Oct. 20th*, 1884.

J. E. Vane, Esq., Chicago, Ills.

DEAR SIR: I understand from Mr. Stewart that it requires but about 3 miles of 2-wire line to be strung to carry 2 of the new wires to the junction with the cable at Chicago, and that it
129 requires but 5 miles more of 2 wires to take 2 more wires to the junction with the cable. Thus by stringing 16 miles of wire we would complete 2 additional wires through to Chicago; also the other 2 wires are within 35 miles of the cable, and also that you have, as he understands, enough wire free from attachment to complete this line.

Will you give me at once an estimate of what it will cost to make this connection complete, and I will endeavor, as I think I can do, to obtain money for this special purpose. You understand that we are making arrangements as fast as possible to pay off the old acc'ts of the B. & M. Teleg'h Co., and I trust that this matter will be in such shape in the coming fortnight. But for this special work above mentioned I would have to provide a fund on the part of the receivers, but it must be used for that special purpose only.

Are the above facts in reference to the condition of the line correct and can you undertake this work, at what price, and how soon can it be finished? Please reply promptly.

Yours truly, JAS. G. SMITH, *Receiver.*

130 "Q."

NEW YORK, *Oct. 25th*, 1884.

J. E. Vane, Esq., 417 Dutton St., Kalamazoo, Mich.

DEAR SIR: Your letter of Oct. 20th received. We would like to have you proceed at once to complete the six unfinished wires to our cable connection in Chicago at the price you name, $2,500, we to furnish the necessary wire, you to put in additional poles you mention and to the trimming, *going*, and other work mentioned in your letter. I wish you would give me at once a statement of exactly what wire is required of both size- beyond what you have on hand and points of distribution. I fear the wire on the St. Louis route is under attachment and we may be unable to get hold of it. If you know to the contrary please advise me. Inquire of Mr. Doolittle about this. We will not at present undertake to rebuild the line from the junction to the cable, as the present poles will bear the additional wire well enough for the present.

Yours truly,

R. S. NEWCOMBE,
JAMES G. SMITH,
Receivers.

131 Q. State if that is another letter you refer to (calling witness' attention to "Exhibit Q").

131 A. Yes, sir; they wanted an explanation about how the wires stood and what condition they were in.

132 Q. State the arrangement you made with them.

A. They were to pay me $2,500.00 for finishing those wires from Hammond to the cable pole, and I was to put in a few extra poles.

133 Q. Where is the cable pole?

A. In Lake, Cook county, about five miles from the post office, and at the end of the cable system.

134 Q. What work were you to perform?

A. I was to string six wires and put in a few extra poles to strengthen a corner and put in some guides on corners where they were weak, and do something that they were to pay for.

135 Q. How many miles was that?

A. About thirty-five miles.

137 Q. How much were you to receive for that work?

A. $2,500.00.

138 Q. On the bill I show you you have a charge for other services and for other work. Make an explanation of what that represents.

A. They wanted to change cross-arms, and then from the junction the board of trade line to the cable poles—seven miles—putting the extra cross-arms and bringing in some extra lines from

132 St. Louis; and Mr. Doolittle asked me if it could not be done on these small poles, and I told him the way I thought it could be done would be to change the arms, insulation, and he asked me how much it would cost to do it, and I told him I would do it for $400.00.

139 Q. State whether that is the amount referred to in the other letter heretofore put in by Mr. Doolittle.

A. Yes, sir.

140 Q. State whether you agreed to put in this extra work for that sum.

A. Yes, sir; I did.

141 Q. State whether you did the work.

A. Yes, sir.

142 Q. What else is there upon that bill that is not in the original contract?

A. Purchasing and putting on five hundred arm braces. Those were long, ten-foot arms, eight pins, and the poles were so small that the end dropped down and we put iron braces up and put on five hundred of them at ten cents each.

143 Q. Who did you agree to do that work for?

A. Mr. Smith. This is a telegram authorizing the purchase of them. (Telegra*ph* shown.)

144 Q. Look upon that and see if it refers to them.

A. Yes, sir.

145 Q. Does that refer to the same?

A. Yes, sir.

133 (The telegram was introduced in evidence and marked "Exhibit R," and another telegram was introduced in evidence and marked "Exhibit S;" also another telegram referring to the same subject and marked "Exhibit T," the telegrams being in the words and figures following:

"R."

DATED —— —.

To J. E. Vane:

Better get arm braces and put them on.

J. G. SMITH, *A. G. M.*

"S."

DATED CHICAGO, —— —.

To J. E. Vane:

Change in cross-arms authorized; push work everywhere and anyhow.

J. R. DOOLITTLE, JR.

"T."

DATED NEW YORK, —— 12.

To J. E. Vane:

You had better string No. six, putting it in place where No. six would go on the arm, and connect the number eight with the No. six, and so utilize the wire, as I do not know how soon we shall be able to furnish the No. eight, but it can then be strung in its proper position. I want to get the connection through soon as possible.

J. G. SMITH, *A. G. M.*

137 Depositions taken before me, George W. Vultee, a notary public within and for the county of New York, in the State of New York, pursuant to the annexed notice, at the time and place therein specified, to be read in evidence on behalf of the receivers in the above-entitled action, pending in the circuit court of the United States for the district of Indiana.

NEW YORK, *October* 26, 1885—3 p. m.

Present: Edward T. Bartlett, Esq., for petitioners; Robert H. Griffin, Esq., for receivers.

EDWARD S. PIGOTT, being duly sworn and examined by Mr. GRIFFIN, testifies as follows:

Q. What is your name?
A. Edward S. Pigott.
Q. And what is your business?
A. I suppose you can call me an accountant.
Q. What has been your business for the past two years?
A. Book-keeper and accountant.
Q. And in whose employ, if any person, have you been?
A. The Bankers' and Merchants' Telegraph Company.
Q. Were you also in the employ of the receivers of the property of the Bankers' and Merchants' Telegraph Company?
A. Yes; of each receivership.
Q. You were in the employ of each receivership?
A. Yes, sir.

138 Q. Of the receivership of Messrs. Newcombe & Smith in the day action, the same gentlemen in the De Haven action, and of Receiver Butler?
A. Yes, sir.
Q. And in what capacity were you employed under those different receiverships?
A. Cashier and book-keeper, they called me.
Q. Did you, as book-keeper or cashier, have charge of the books of the receivers' certificates during that time?
A. Yes, sir.
Q. Do you know if any receivers' certificates were issued during the term of any of these receiverships?
A. Yes, sir.
Q. Whose duty was it to fill up the blanks in these receivers' certificates and the stubs attached to them, if there were any?
A. I was deputed to fill out the certificates signed by the receivers.
Q. And you so did in each instance?
A. Yes, sir.
Q. Have you the books of the receivers' certificates with you?
A. Yes, sir.
Q. Have you examined those books and from them drawn up and prepared any list of receivers' certificates issued under those different receiverships?
A. Yes, sir; I have.

139 Q. You examined those books and prepared, as you have said it has been, the amount of receivers' certificates issued under all the receiverships?

A. Under each and under all.

Q. Under all—the total—first?

Objected to as incompetent and immaterial.

Question withdrawn.

Q. Can you, from your own knowledge, tell me the total amount of receivers' certificates issued in the different receiverships?

WITNESS: All told, you mean?

COUNSEL: Yes.

A. $732,802.06.

Q. Into how many classes do you divide all these receivers' certificates? *A.* Do you make any distinction between the receivers' certificates issued?

A. Yes, sir; I made a distinction as to the amount of general certificates issued by Newcombe and Smith, the first receivers, and also the amount of special certificates issued by the same receivers.

Q. What amount of special receivers' certificates were issued.

(Objected to as incompetent and immaterial and not the best evidence.)

A. The issue of the special certificates amounted to $130,000.

Q. Do you know that, from your own knowledge, to be the fact?

A. Yes, sir.

140 Q. Will you please look at this paper I now hand you and tell me whether that is a copy of the special receivers' certificates?

A. Yes, sir; that is the correct copy.

Mr. GRIFFIN: I offer this in evidence.

Mr. BARTLETT: I object to it as incompetent and immaterial and not the best evidence.

It is marked "Exhibit No. 1, October 26th, 1885, George W. Vultee."

Q. How many of these special receivers' certificates were objected?

Objected to as incompetent and immaterial and not the best evidence.

A. $130,000.

Q. Were those $130,000 comprised in one or more certificates?

A. In more than one.

Q. How many, sir?

A. They are numbered from 1 to 16, inclusive.

Q. What was the date of the first of those certificates issued?

A. They were all issued under one date, November 11, 1884.

Q. To whom were they issued?

A. They were issued to A. J. Baldwin.

Q. Can you tell me of your own knowledge what amount of general receivers' certificates were issued by Newcombe and Smith?

Objected to as incompetent and immaterial and not the best evidence.

141 A. Yes, sir; $470,052.06.

Q. Please look at this paper I now hand you and tell me whether that is a copy of the general receivers' certificates.

A. Yes, sir; that is a correct copy.

Mr. GRIFFIN: I offer this in evidence.

Objected to as immaterial and incompetent and not the best evidence.

It is marked "Exhibit No. 2, October 26th, 1885, George W. Vultee."

Q. What is the date of the first general receivers' certificates issued by Newcombe and Smith?

A. January 12, 1885.

Q. And what is the date of the last general receivers' certificates issued by Newcombe and Smith?

A. February 27th, 1885.

Q. State, if you can, from your own knowledge the amount of receivers' certificates issued by Receiver Butler.

Objected to as incompetent and immaterial and not the best evidence.

A. The amount of certificates issued by Mr. Butler as receiver was $132,750.

Q. And what was the date of the first certificate issued by him?

A. The first certificate issued by him was March 14, 1885.

Q. And the last one?

A. The last one was signed by him on May 11th, 1885.

142 Q. All the other certificates issued by Butler were issued between the two dates last mentioned by you?

A. Yes, sir.

Q. And all the other receivers' certificates issued by Newcombe and Smith were issued between the 12th day of January and the 27th of February?

A. Yes, sir.

Q. Do you know where the originals of all these receivers' certificates are?

A. No, sir; they are in circulation, but I can't tell in whose hands they are.

By Mr. BARTLETT:

Q. Do I understand you that you filled out all the stubs and certificates for all the receivers' certificates issued by the various receivers?

A. Yes, sir.

Q. Without exception?

A. All that we used. There were two filled out in the handwriting of Mr. Newcombe himself, but they were not used; they were afterwards cancelled.

Q. I understand that you filled out the stubs and certificates of all that were used?

A. Yes, sir.

Q. Did the various receivers use one certificate book, or was there a book for each set of receivers?

143 A. There was one book for the general certificates and one for the specials.

Q. The book for the special certificates you have with you in court to-day?

A. Yes, sir.

Q. And the book for the general certificates you have with you in court to-day?

A. Yes, sir; that is also here.

Q. This list that you have produced here and that has been offered in evidence embodies the entries in these two classes of certificates as described by the certificate books?

A. Yes, sir.

Q. And the whole of them?

A. Yes, sir.

Q. And no more?

A. No, sir; no more.

Q. You have testified of your own knowledge that $732,802.06 of certificates were issued. Do you speak in that connnection from memory or from the entries as you find them in the books?

A. I speak from the entries in the books, sir.

Q. What relation did A. J. Baldwin sustain to the Bankers' and Merchants' Telegraph Company, to your knowledge?

A. My knowledge is that there was a contract between the Bankers' and Merchants' Telegraph Company and Mr. Baldwin to construct some lines west. I don't know of my own knowledge.

144 The contract business was out of my province.

Q. Do you know what portion of the line he was to construct west?

A. No, sir; I do not.

Q. Do you know whether or not he was a member of the Merchants' Telegraph Construction Company?

A. I have heard that he was president of that company, but I don't know of my own knowledge.

Q. Were these special certificates 1 to 16 issued to A. J. Baldwin individually?

A. Well, that I couldn't say positively. My impression at the time was that it was on account of the contract. I don't know of my own knowledge.

Q. Will you open the special certificate book and read, if you please, the form of receipt that Mr. Baldwin executed?

A. Yes, sir. The number of the stub corresponds with the certificate itself; then to whom it is issued, and the amount, $10,000, and the date, November 10, 1880; "for" is left in blank; and then "Received the above certificate;" and it is signed A. J. Baldwin, November 11, 1884.

Q. Are all the sixteen certificates duplicates of that entry on stub No. 1?

A. With this exception, that there is a certain number of $10,000 denomination and a few of $5,000 denomination.

Q. With that exception they read the same?

145 & 146 A. Yes, sir.

Q. They are receipted for by A. J. Baldwin?

A. Yes, sir.

By Mr. GRIFFIN:

Q. Do you know in what action the special receivers' certificates were issued?

Objected to as incompetent and immaterial and not the best evidence.

A. I don't carry that in my mind. I can give you the date of the order of the court.

Q. Do you carry that in your mind?

A. I see that right before me.

Q. Under what date was that?

Objected to as incompetent and immaterial and not the best evidence.

A. Special receivers' certificates, pursuant to order of the supreme court dated November 3, 1884.

Mr. GRIFFIN: I now offer in evidence copy order bearing date on the 3rd day of November, 1884, in the action of Austin G. Day against The Bankers' and Merchants' Telegraph Company, such copy order being exemplified.

Objected to as incompetent and immaterial.

Said paper is marked "Exhibit No. 3, October 26th, 1885, George W. Vultee."

Q. Do you know the date when Messrs. Newcombe and Smith were appointed receivers in the Day action?

Objected to as incompetent and immaterial and not the best evidence.

147 A. They commenced the receivership, I believe, on the 23rd of September, 1884.

Mr. GRIFFIN: I offer in evidence exemplified copy order filed September 23, 1884, in the action of Austin G. Day against The Bankers' and Merchants' Telegraph —, appointing Messrs. Richard S. Newcombe and James G. Smith receivers of said company.

Objected to as incompetent and immaterial.

Said paper is marked "Exhibit No. 4, October 26th, 1885, George W. Vultee."

Q. State, if you can, when Messrs. Newcombe and Smith were appointed receivers of the Bankers' and Merchants' Telegraph Company in the action of De Haven against that company.

Objected to as incompetent and immaterial and not the best evidence.

A. I am not able to answer that date. I thought the receivership was continuous from the day they qualified, September 23, 1884. I was not aware of any interruption to the term of the receivership.

Mr. GRIFFITH: I offer in evidence exemplified copy of the judgment entered in the action of Alexander H. De Haven against The Bankers' and Merchants' Telegraph Company whereby the receivership of the aforesaid Newcombe and Smith was continued in the De Haven action.

Objected to as incompetent and immaterial.

148 Said paper is marked "Exhibit No. 5, October 26th, 1885, George W. Vultee."

Q. Do you know the date of the appointment of Mr. Butler as receiver?

Objected to as incompetent and immaterial and not the best evidence.

A. I believe it was on March 4th or 3rd, 1885.

Mr. GRIFFIN: I offer in evidence an exemplified copy order entered in both of the last above named actions discharging Receivers Newcombe and Smith and substituting Mr. James B. Butler in their place and stead as receiver.

Objected to as incompetent and immaterial.

Said paper is marked "Exhibit No. 6, October 26, 1885, George W. Vultee."

Adjourned to October 28th, 1885, at 2 p. m.

NEW YORK, *October* 29, 1885—2 p. m.

Present: Same parties.

EDWARD S. PIGOTT'S examination continued by Mr. GRIFFIN as follows:

Q. You testified, Mr. Pigott, at the last session, that all the receivers' certificates were filled out by you, and that all the stubs attached to them were filled out by you. Will you please tell us now to whom and on what dates and for what amounts certificates, 1 to 5, both inclusive, were issued.

Objected to as incompetent, immaterial, and not the best evidence.

149 A. They were issued in the denomination of $10,000 each for cash, less ten per cent.

Q. And to whom were they issued?

A. They were taken by Dellotte & Durand.

Q. Are they bankers and brokers in this city?

A. They are stock brokers.

Q. Those certificates issued to Dellotte & Durand, as well as all the other receivers' certificates, are in circulation, are they not?

A. Yes, sir.
Q. The company has parted with the possession of them?
A. Yes, sir.
Q. Now please state as to certificates 6 and 7.

(Same objection.)

A. Certificate No. 6 was cancelled. No. 7 was also cancelled.
Q. To whom was certificate No. 8 issued?

(Same objection.)

A. Certificate No. 8 was issued for $25,000 to George D. Roberts for the surrender of a note of that amount and collateral security.
Q. Whose note was it?
A. It was a note of the Bankers' and Merchants' Telegraph Company.
Q. What was the date of the issue of that certificate to Roberts?
A. It was dated January 23, 1885.
Q. I omitted to ask you for the dates of certificates 1 to 5.

(Same objection.)

A. They were dated January 12, 1885.
150 Q. Now, as to certificate No. 9.

(Same objection.)

A. Certificate No. 9 was issued on January 23rd, for $4,026, to F. W. Jones, who had a bill or two or three bills against the company. They were sold to him at 90.
Q. For what was his bill?
A. For the use of patents and some things of that description.
Q. Please state in the same manner as to certificate No. 10.

(Same objection.)

A. No. 10 was cancelled.
Q. Please state in the same manner as to certificates Nos. 11 to 41, both inclusive.

(Same objection.)

A. Certificates Nos. 11 to 41 were issued for $5,000 each, amounting in the aggregate to $155,000.
Q. What was the date of those certificates?
A. January 30th.
Q. And to whom were they issued?
A. They and some others were issued to Alfred Sully and W. S. Myton, who held notes of the company to the amount of $441,600.
Q. Which were the other certificates that were issued to Mr. Sully and Mr. Myton?

(Same objection.)

A. Certificates Nos. 42 to 52 for $1,000 each, No. 60 for $200, Nos. 61 to 78 for $5,000 each, No. 79 for $1,000, No. 80 for $800,
151 and Nos. 121 and 122 for $2,500 each, amounting to $5,000. The whole amount reaches the figures of $270,000, which they accepted in settlement of their claim.

Q. That claim being of the amount already stated by you?
A. Yes, sir.
Q. Did all of those certificates issued to Sully and Myton bear the same date?
A. Yes, sir.
Q. And what date was that?
A. That was January 30, 1885.
Q. Please go on in the same manner in reference to certificates 81 to 86.

(Same objection.)

A. Nos. 81 to 86 were issued on January 31, 1885, for $2,000 each. No. 87 was cancelled. No. 88 was also issued of the date of January 31, 1885. These were issued to W. H. Wright in settlement of a judgement in a suit and costs.
Q. Do you know for what Mr. Wright had sued the company?
A. He had a contract for construction.
Q. Laying of the lines and erection of telegraph poles?
A. Yes; and stringing wires, and so on.
Q. What was the amount of certificate No. 88?
A. That was one certificate of $1,225.33.
Q. Please state as to certificate 89.

(Same objection.)

152 A. Certificate No. 89, dated February 3, 1885, was issued to John A. Roebling, Sons & Co. for $57,356.29.
Q. What was the consideration for that certificate?
A. John A. Roebling, Sons — Co. had recovered a judgement against the company for $75,645.64, with interest.
Q. And that certificate was issued in settlement of that judgement?
A. Yes, sir; in this way, that the amount of the judgement was $75,645.64, added to which is interest from August 23rd to that date, amounting to $1,975.40. The footing of those two is $77,265.04, and there was a credit of a claim which they accepted against the Chicago and Northwestern Co., who assigned their claim to the Roeblings, amounting to $20,268.75. Deducting that from the amount previously mentioned leaves a balance of $57,356.29, the amount of certificate No. 89.
Q. For what was the judgement of Roebling Sons recovered?
A. A supply of telegraph wire.
Q. To the Bankers' and Merchants' Company?
A. Yes, sir.
Q. And for what was the claim assigned to Roebling Sons which you have mentioned?
A. That was for supply of wire also.
Q. Who assigned that claim to Roebling Sons?
A. The Chicago & Northwestern Telegraph Co. They
153 owed the Bankers' and Merchants' $20,268.75, and Roeblings accepted the assignment of that claim in part settlement of their account.

Q. Do you know on what part of the line the wires supplied by Roebling was used?

A. I couldn't say that positively.

Q. Your best impression, then.

A. Over all the entire route.

Q. Go on with certificates Nos. 90 to 94, both inclusive.

(Same objection.)

A. Nos. 90 to 94, dated February 14, 1885, were issued for $5,000 each, for cash, less ten per cent.

Q. To whom were they issued?

A. I have not got the name down. I presume they were discounted by Mr. Newcombe. I have not got any name. They were filled out to be negotiated and the name was omitted to be furnished to me.

Q. You mean Receiver Newcombe?

A. Yes, sir. The amount is credited so much, $25,000, less ten per cent., in the cash book.

Q. Explain fully what you mean by issuing certificates less ten per cent.

A. It means a discount for cash.

Q. That is, you would sell a $1,000 certificate for $900?

A. Yes, sir; that is it.

Q. Now, as to certificate No. 95.

154 (Same objection.)

A. That is dated on February 26, 1885, and issued to W. J. Best, who rendered some services to the receivers; and this certificate for $1,111.11 was issued to him in part payment of his services.

Q. Those services were that of accountant?

A. In the receivers' accounting.

Q. Now, as to certificates 96 to 98, both inclusive?

(Same objection.)

A. They were issued dated February 27, 1885, for $1,000 each, amounting to $3,000, for cash at par.

Q. To whom were they issued?

A. They were issued to bearer, to be negotiated and receipted for by E. S. Stokes.

Q. The cash for those certificates, was it received by the receivers?

A. Yes, sir; received for them by me and credited in their cash book.

Q. And that is also true as to certificates Nos. 90 to 94, both inclusive, which were also, you say, issued for cash?

A. Yes, sir.

Q. The amount of cash represented by those certificates less ten per cent. was actually received by the receivers?

A. Yes, sir.

Q. Now, as to certificates 99 to 113 and certificates 114 to 119, all inclusive?

(Same objection.)

155 A. Certificates Nos. 99 to 113, dated February 27, 1885, were issued at $1,000 each, and certificates of the same date, Nos. 114 to 119, were issued at $500 each, amounting together to $18,000.

Q. They were issued at par?

A. No, sir; they were issued to E. Middleton, who had a judgement against the company for $16,697.50, and he took the certificates at 90. That, of course, gives a premium on the certificates. For him to realize the amount of his claim you divide the amount by 90 and it gives a premium, and the whole amount realized to his credit was $18,000.

Q. What was Mr. Middleton's judgement?

A. Wire, principally, and some work performed for the company.

Q. Wire and services rendered?

A. Yes, sir.

Q. Go on to certificate 120.

(Same objection.)

A. No. 120 was issued dated February 27, 1885, for $3,333.33, to W. J. Best, being the balance of his charge for the accounting of Newcombe and Smith to the court. I might state here that those were the entire amount of general certificates issued by Newcombe and Smith.

Q. No. 122 was the last certificate issued by Newcombe and Smith?

156 A. Yes; under the order of January 6th. At this period the receivership changed hands. Messrs. Newcombe and Smith went out and Mr. Butler took charge.

Q. Now, as to certificates Nos. 123 to 137.

(Same objection.)

A. Nos. 123 to 130, dated March 14, 1885, were issued for $10,000 each, for cash, less ten per cent.

Q. Now, go on with 131.

A. 131 was issued March 19, 1885, for $10,000 cash, less ten per cent.

Q. Now, 132.

A. Nos. 132 and 133 were issued on March 25th, for $10,000 each, cash, less ten per cent.

Q. And No. 134.

A. 134 was issued on the same date for $5,000 cash, less ten per cent.

Q. Nos. 135 and 136.

A. They were issued on April 9, 1885, for $5,000 each, for cash, less ten per cent.

Q. And 137.

A. That was issued on May 11th, 1885, for $7,750 cash, less ten per cent.

Q. The cash on certificates 123 to 137, both inclusive, was actually received by the receiver of the company?

A. Yes, sir; the whole of those certificates were issued for cash.

Q. The certificates you have just testified to, namely, 1 to 137, include all the general certificates issued by these receivers?

A. Yes, sir.

157 Q. And were each of these certificates similar in form and in wording in every particular to the copy of the certificates which is already in evidence?

A. Exactly the same, sir.

Q. Except as to the dates and amounts?

A. Yes, sir.

Q. Were each of the special certificates issued similar in wording and in form to the copy of the special receivers' certificates which is in evidence?

A. Yes, sir.

By Mr. BARTLETT:

Q. In testifying to-day you have read from a paper, have you not?

A. Yes, sir.

Q. What is that paper?

A. That is a copy of the stubs of the certificate book.

Q. The general certificate book?

A. Yes, sir.

Q. Who made this copy?

A. I made it, sir.

Q. When did you make it?

A. Three or four days back. I made it for the purpose of facilitating my answers in this testimony instead of referring to the book.

Q. In testifying as you have to-day do you speak from your memory or from the information conveyed to you by the books and by this paper?

158 A. I speak from my knowledge of the fact of issuing the certificates under the direction of the receivers—that is to say, filling them out for their signatures.

Q. Unaided by books or this paper that you held in your hand, could you speak from memory as to what you testified to?

A. Yes; I speak from my own knowledge that I issued all those certificates.

Q. Would you be able to give the facts as you have given them with regard to each certificate except for the books?

A. I have a knowledge of the issue of the certificates, filling them out, and handing them over to the parties to whom they were to be paid.

Q. I don't think you quite understand me. Would you be able to specify the particulars as you have specified concerning each certificate unaided by the books?

A. I think I would.

Q. You said Mr. Roebling had recovered a judgement against the company?

A. Yes, sir.

Q. Had you any personal knowledge as to that judgement?

A. Not as to the judgement.

Q. You never saw the judgement-roll or any papers in the clerk's office?

A. I have seen papers that have been in my possession.

159 Q. What papers?

A. The judgement papers.

Q. What papers?

A. The papers in reference to the suit.

Q. Could you name any paper?

A. No; I couldn't do that; but they were all in my charge. When I handed the receivers' certificates over those papers were in my charge at the same time.

Q. You never saw the judgement record in the clerk's office?

A. No, sir.

Q. You say certain claim was assigned to Mr. Roebling; did you see the assignment of that claim?

A. I saw it, because it was in my possession for a time; but I didn't read it.

Q. You never read it?

A. No, sir.

Q. Then you testified as to that assignment from what you understood in the matter, I presume?

A. Yes; I testified as to the entry that there was an assignment.

Q. There was an entry to that effect?

A. Yes, sir.

Q. That is the source of your information?

A. Besides, I know the assignment papers passed through my hands.

Q. You say you never read the assignment; you got a knowledge of the fact that there was an assignment from some other source than the paper itself?

160 A. No; because the papers were given to me with the understanding that that was an assignment in settlement.

Q. With whom was that understanding?

A. The receivers, when they handed the papers to me to take care of them.

Q. The receivers said so?

A. Yes, sir.

Q. You testified as to what the receivers said to you?

A. In that case; yes, sir.

Q. Had you any personal knowledge as to where wire was used on the route?

A. No, sir.

Q. You never were out on the line, were you?

A. No, sir.

Q. Were any of these certificates issued with a less discount than ten per cent?

A. No, sir.

Q. They all passed through your hands?

A. Yes. I speak positively as to that.

Q. Were they all issued at that discount?

A. With the exception of those that were issued at 90 in settlement. All those that were issued for cash were settled for that discount.

Q. That these were disposed of for cash? Did the cash pass through your hands?

A. Yes, sir.

Q. Did you ever see the records of the Middleton judgment in the clerk's office?

A. Not in the clerk's office.

161 Q. What knowledge you have of that judgment was communicated to you by others, I presume?

A. By others; yes, sir.

Q. Do you mean to say that from memory, unaided by the books, you could give all the information that is contained in these papers from which you testified?

A. I believe I could.

By Mr. GRIFFIN:

Q. Your memory is sufficiently refreshed from that paper to testify positively?

A. Yes, sir.

By Mr. GRIFFIN:

Q. It acts as a refresher on your mind?

A. Yes, sir. I presume the gentleman means whether I could carry my memory as to the numbers of these certificates.

Q. My question was, as to all the information you have given us to-day, whether you could have given it from memory and unaided by the books?

A. I can speak positively as to the total amount issued. Probably I couldn't repeat every number of the certificates.

Q. And each detail?

A. Not in detail as to the numbers, but as to the total amount I think I could.

Q. Your testimony covers, as I understand, all the general

162 certificates issued by the three sets of receivers?

A. Yes, sir.

Q. And all of the particulars in regard to them and their negotiations?

A. Yes, sir.

By Mr. GRIFFIN:

Q. Your knowledge of the facts which you have testified to has been derived from the documents in each of these matters which have passed through your hands, and from general knowledge of the office business?

A. Yes, sir.

Q. In your position as accountant or book-keeper or clerk for the receivers all these matters came under your direct notice, did they not?

A. Yes, sir.

E. S. PIGOTT.

Sworn to before me this 26 day of October, 1885.

GEORGE W. VULTEE,
Notary Public (31), *C. & C. of N. Y.*

EXHIBIT No. 1.

No. ——. $——.

Special Receivers' Certificate of Indebtedness.

Total amount of issue, $150,000.

Under mortgage to Farmers' Loan and Trust Company, Bankers' and Merchants' Telegraph Company.

163 This is to certify that the bearer hereof is entitled to receive from Richard S. Newcombe and James G. Smith and their successors, as receivers of the property of the Bankers' and Merchants' Telegraph Company, but not personally, the sum of — dollars, upon the production and surrender hereof, on the first day of November, 1886, at the office of said receivers, in the city of New York, with interest thereon from the date hereof at the rate of six per cent. per annum, payable on the first days of each May and November, unless said sum and interest thereon as aforesaid be sooner paid by the receivers out of the moneys coming into their hands from time to time applicable thereto or the moneys realized by them upon the sale of the property in their hands, the receivers reserving the right to pay principal and interest at any time within said period. This certificate is one of a series of certificates amounting in the aggregate to the sum of 150,000 dollars and issued or to be issued under the authority and by virtue of the order of the supreme court of the State of New York and for the purposes and objects therein mentioned, said order being made on the third day of November, 1884, in an action in said court wherein Austin G. Day is plaintiff and said Telegraph Company is defendant. Said certificates are hereby declared to be a debt of
164 the receivers, incurred for the benefit and protection of the property in their hands, and, until full payment thereof, to be a first lien and charge upon all the telegraph lines and properties which are located between Freeport, O., and Hammond, Ind., and between Pittsburgh, Pa., and Indianapolis, Ind., and between Richmond, Ind., Eaton, O., and Cincinnati, O., according to a certain deed of trust or mortgage given to secure this issue of certificates, covering said lines and properties, executed by said receivers to the Farmers' Loan and Trust Company, as trustees, dated Nov. 7, 1884. Transferable upon the books of the receivers upon surrender of this certificate.

In witness whereof we, as receivers as aforesaid, but not personally, have signed this certificate this — day of ——, one thousand eight hundred and eighty.

—— ——,
—— ——,
As Receivers of the Bankers' and Merchants' Telegraph Company.

Copy.

EXHIBIT No. 2.

Receivers' Certificate of Indebtedness, Bankers' & Merchants' Telegraph Company.

165 This is to certify that the bearer hereof is entitled to receive from Richard S. Newcombe and James G. Smith and their successors, as receivers of the property of the Bankers' and Merchants' Telegraph Company, but not personally, the sum of — dollars, upon the production and surrender hereof, on the first day of January, 1887, at the office of said receivers of the company, in the city of New York, with interest thereon from the date hereof at the rate of six per centum per annum, payable on the first days of each January and July, unless said sum and interest thereon as aforesaid be sooner paid by the receivers out of the moneys coming into their hands from time to time applicable thereto or the moneys realized by them upon the sale of the property in their hands, the receivers reserving the right to pay principal and interest at any time within said period. This certificate is one of a series of certificates issued or to be issued under the authority and by virtue of a certain decree or judgment of the supreme court of the State of New York and for the purposes and objects therein mentioned and made in an action in said court wherein Alexander H. De Haven is plaintiff and The Bankers' and Merchants' Telegraph Com-
166 pany, Richard S. Newcombe and James G. Smith, as receivers of said Bankers' and Merchants' Telegraph Company, and The Farmers' Loan and Trust Company, as trustees for the bondholders under the mortgages executed by said telegraph company, are defendants. Said certificates are hereby declared to be a debt of the receivers incurred for the benefit and protection of the property in their hands and a lien and charge, as provided in said decree or judgement, and are transferable upon the books of the receivers upon surrender of this certificate.

In witness whereof we, as receivers aforesaid, but not personally, have signed this certificate this — day of ——, one thousand eight hundred and eighty.

—— ——,
—— ——,
As Receivers of the Bankers' and Merchants' Telegraph Company.

EXHIBIT No. 3.

[SEAL.] The people of the State of New York, by the grace of God free and independent, to all to whom these presents shall come or may concern, Greeting:

Know ye that we, having examined the records and files in the office of the clerk of the county of New York and clerk of the supreme court of said State or said county, do find a certain order there remaining in the words and figures following, to wit:

167 At a special term of the supreme court held, at the court-house, in the city of New York, on the 3rd day of November, 1884.

Present: Hon. George P. Andrews, justice.

AUSTIN G. DAY
against
THE BANKERS' & MERCHANTS' TELEGRAPH COMPANY.

Upon the order herein, dated October 30th, 1884, wherein John E. Ward, Esq., was appointed referee to take the testimony and proofs and report thereon, with his opinion, in the matter of the Merchants' Telegraph Construction Company, upon reading and filing said order and the petition of the receivers of the Bankers' & Merchants' Telegraph Company upon which said order was granted, the referee's oath herein, the testimony and proofs taken before said referee, and his report and opinion thereon, and due deliberation having been had thereon, and it appearing, satisfactory to the court, that it is for the best interests of the Bankers' and Merchants' Telegraph Company and those therein interested that a redemption of the lines mentioned in the said report should be had at once, it is, on

168 motion of John Fettretch, counsel for said receivers, ordered—

I. That the receivers of the Bankers' and Merchants' Telegraph Company be, and they are hereby, instructed to at once issue said receivers' certificates in an amount not exceeding one hundred and fifty thousand dollars, to be payable at such time as said receivers may think best, not exceeding two years from their date, and to be redeemable by said receivers at any time within said period; to bear interest at the rate of six per cent. per annum, payable semi-annually, and to contain such conditions as may be deemed necessary and requisite; said issue of said certificates to be secured by a trust deed in the nature of a first lien for $150,000 on all of the lines of telegraph at and between Freeport, in Ohio, and Hammond, in Indiana, and at and between Pittsburgh, in Pennsylvania, and Indianapolis, in Indiana, with a branch to Cincinnati, in Ohio, and to cover all the intermediate points, and to be prior as a redemption debt to every other lien, claim, or encumbrance thereon.

II. That of said issue of $150,000 an amount of $130,000 in said certificates so secured be delivered to said Merchants' Telegraph Construction Company, or to such persons as it shall designate,

169 in full liquidation and payment of indebtedness of the

Bankers' and Merchants' Telegraph Company to it and in relinquishment of the possession and possession of the receivership of said construction company.

III. That the balance of said $150,000, in duplicate, to wit, $20,000, be applied to the completion of the lines between Pittsburgh and Indianapolis, and that the said receivers have such power and authority with reference thereto as is necessary to finish the construction thereof and place the same in working order.

IV. That said receivers have full power and authority to make, execute, and deliver such instruments, writings, or papers, under seal or otherwise, as may be requisite and necessary to effectuate the plan for the redemption of said lines above named and to fully carry out and consummate the provisions of this order.

Enter.

G. P. A., *J. S. C.*

All which we have caused, by these presents, to be exemplified and the seal of our said supreme court to be hereunto affixed.

Witness Abraham R. Lawrence, justice, at the city of New York, the 22nd day of October, in the year of our Lord one thousand eight hundred and eighty-five — of our Independence the one hundred and tenth.

PATRICK KEENAN, *Clerk.*

170 I, Abraham R. Lawrence, a presiding justice of the supreme court of the State of New York for the city and county of New York, do hereby certify that Patrick Keenan, whose name is subscribed to the preceding exemplification, is the clerk of the said county of New York and clerk of said supreme court for said county, duly elected and sworn, and that full faith and credit are due to his official acts. I further certify that the seal affixed to the exemplification is the seal of our said supreme court, and that the attestation thereof is in due form.

Dated New York, Oct. 22nd, 1885.

ABR'M R. LAWRENCE, *J. S. C.*

STATE OF NEW YORK, }
City and County of New York, } ss:

I, Patrick Keenan, clerk of the supreme court of said State in and for the city and county of New York, do hereby certify that Abraham R. Lawrence, whose name is subscribed to the preceding certificate, is presiding justice of the supreme court of said State in and for the city and county of New York, duly elected and sworn, and that the signature of said justice to said certificate is genuine.

In testimony whereof I have hereto set my hand and affixed the seal of said court this 22d day of Oct., 1885.

[SEAL.] PATRICK KEENAN, *Clerk.*

171 EXHIBIT No. 4.

[SEAL.] The people of the State of New York, by the grace of God free and independent, to all to whom these presents shall come or may concern, Greeting:

Know ye that we, having examined the records and files in the office of the clerk of the county of New York and clerk of the supreme court of said State or said county, do find a certain order there remaining in the words and figures following, to wit:

At a special term of the supreme court of the State of New York held in and for the first judicial district, at the court-house, in the city of New York, on the 23rd day of Sept., 1884.

Present: Hon. Chas. Donohue, justice.

AUSTIN G. DAY, Plaintiff,
ag'st
BANKERS' & MERCHANTS' TELEGRAPH COMPANY, Defendants.

It appearing to the court by the complaint in this action and the affidavit of Adrian H. Johnie, verified on the 16th day of September, 1884, that the defendant is a domestic corporation created by and under the laws of the State of New York, and that the
172 plaintiff is a judgement creditor of said corporation, and that an execution issued upon said judgement by the sheriff of the city and county of New York, the county where said corporation transacts its general business and where its principal office was and now is located, has been returned wholly unsatisfied; and it appearing that this action has been commenced by service of a copy of the summons and complaint herein, and an order to show cause having been granted upon the papers aforesaid, bearing date September 16, 1884, why a temporary receiver of said corporation should not be appointed and an injunction issue pursuant to the provisions of sections 1787 & 1788 of the Code of Civil Procedure: Now, on reading and filing the summons and complaint in this action and the affidavit of Adrian H. Johne, sworn to September 16th, 1884, and the said order to show cause and proof of service of the said summons, complaint, and affidavit and order to show cause upon the defendant and upon the attorney general of the State of New York, on motion of Butler, Stillman and Hubbard, attorneys for the plaintiff, and after hearing Francis N. Bangs for the said defendant, and William A. Poste, representing the attorney general, and Simpson & Werner & Joseph Fettich, attorneys, represent-
173 ing certain creditors, it is ordered that Richard S. Newcombe and James G. Smith be, and they are hereby, appointed receivers of all the stock, property, and assets, real, personal, and mixed, of the said defendant, Bankers' and Merchants' Telegraph Company, with the usual powers and duties of receivers, according to the laws of this State and the practice of this court, including full power and authority to demand, sue for, collect, receive, and take into *his* possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in ac-

tion, bills, notes, and property or every description belonging to the said company, wheresoever situate, and with all the powers and authority and subject to the duties and liabilities of a permanent receiver, upon their executing and acknowledging in the usual form and filing with the clerk of the city and county of New York a bond to the people of the State of New York in the penal sum of fifty thousand dollars, with two or more sufficient sureties, freeholders or householders within this State, who shall severally justify, conditioned for the faithful discharge by said receivers of their duties as such and for the due accounting for all moneys
174 or property of every kind received by them as such receivers, which bond is to be approved as to its sufficiency, form, and manner of execution by a justice of this court; and upon filing said bond so approved the said receivers are hereby authorized and directed to collect and receive all the property of said corporation, to preserve them, and, until the further order of this court, to operate and manage the several lines of telegraph belonging to the said defendant, and to receive the rents, tolls, and income thereof, and to carry out and perform any and all existing contracts relating to the operation and use of said lines or any thereof, and to maintain and defend any suits, actions, or proceedings which it may be necessary for them to maintain or defend; and they are further authorized & directed to employ such agents, attorneys, and servants as may be necessary for the proper discharge of their duties as such receivers.

And it is further ordered that the said defendant and its trustees, directors, managers, and other officers and servants and all other persons be, and they are hereby, enjoined and restrained from exercising any of the corporate rights, privileges, or franchises of the said corporation during the pendency of this action, except
175 by express permission of the court, and from interfering in any manner with said receivers in the discharge of their duties, and from collecting or receiving any debts due said corporation, and from paying out, selling, assigning, or transferring any of the estate, moneys, lands, tenements, or effects of the said corporation, except to said receivers or under the orders of this court.

And it is further ordered that whenever the funds and moneys of the corporation in the hands of said receivers not needed for immediate disbursement amount to the sum of ten thousand dollars the said receivers deposit the same with the Central Trust Company of New York, which is hereby designated as the place of deposit for all said funds and moneys.

C. DONOHUE, *J.*

All which we have caused by these presents to be exemplified and the seal of our said supreme court to be hereunto affixed.

Witness Abraham R. Lawrence, justice, at the city of New York, the 21st day of October, in the year of our Lord one thousand eight hundred and eighty-five, — of our Independence the one hundred and tenth.

PATRICK KEENAN, *Clerk.*

176 I, Abraham R. Lawrence, a presiding justice of the supreme court of the State of New York for the city and county of New York, do hereby certify that Patrick Keenan, whose name is subscribed to the preceding exemplification, is the clerk of the said county of New York and clerk of said supreme court for said county, duly elected and sworn, and that full faith and credit are due to his official acts. I further certify that the seal affixed to the exemplification is the seal of our said supreme court, and that the attestation thereof is in due form.

Dated New York, Oct. 21st, 1885.

ABR'M R. LAWRENCE.

STATE OF NEW YORK, *City and County of New York,* } ss:

I, Patrick Keenan, clerk of the supreme court of said State in and for the city and county of New York, do hereby certify that Abraham R. Lawrence, whose name is subscribed to the preceding certificate, is presiding justice of the supreme court of said State in and for the city and county of New York, duly elected and sworn, and that the signature of said justice to said certificate is genuine.

In testimony whereof I have hereto set my hand and affixed the seal of the said court this 21st day of October, 1885.

PATRICK KEENAN, *Clerk.*

177 EXHIBIT No. 5.

[SEAL.] The people of the State of New York, by the grace of God free and independent, to all to whom these presents shall come or may concern, Greeting:

Know ye that we, having examined the records and files in the office of the clerk of the county of New York and clerk of the supreme court of said State or said county, do find a certain judgement there remaining in the words and figures following, to wit:

At a special term of the supreme court held at the court-house, in the city of New York, on the 6th day of January, 1885.

Present: Hon. Charles Donohue, justice.

Judgement.

ALEXANDER H. DE HAVEN
against
THE BANKERS' AND MERCHANTS' TELEGRAPH COMPANY, RICHARD S. Newcombe and James G. Smith, as Receivers of the Bankers' and Merchants' Telegraph Company, and the Farmers' Loan and Trust Company, as Trustee for the Bondholders under the Mortgages Executed by said Telegraph Company.

178 The plaintiff herein having heretofore duly applied to this court for leave to bring this action and to include the above receivers as parties defendant thereto, and an order having

been duly made granting such leave, and the plaintiff having duly served his summons and complaint on each, every, and all of the said defendants, and the defendants having duly appeared and answered herein, the said defendant, The Bankers' and Merchants' Telegraph Company, by George Putnam Smith, Esq., its attorney; the said defendant receivers of said company, by Simpson & Werner, their attorneys, and the said defendant, The Farmers' Loan and Trust Company, by Turner, Lee & McClure, Esqs., its attorneys, and the issues herein having been duly joined and noticed for trial, and thereafter an order of reference having been duly made and entered appointing Thomas S. Moore, Esq., sole referee herein to take the testimony and proofs and to report to the court thereon, with his opinion, and it appearing that the said referee has been attended by counsel for all parties in interest, and having taken the testimony and proofs, and having reported the same to the court, with his opinion thereon, and the matters now coming on for final hearing on all the papers, pleadings, and proceedings herein, and the plaintiff moving for a confirmation of the said referee's report and
179 for judgement herein, after hearing Charles C. Suydam, Esq., of counsel for plaintiff; George Putnam Smith, Esq., of counsel for the defendant telegraph company and of counsel for general mortgage bondholders, aggregating about three million five hundred thousand dollars ($3,500,000); Joseph Fettretch, Esq., and Angel J. Simpson, Esq., of counsel for the defendant receivers; Herbert B. Turner, Esq., of counsel for the defendant trustee, and George E. Sibley, Esq., of counsel for certain first of divisional mortgage bondholders, the attorney general of the State of New York, by and through Hon. William A. Poste, deputy attorney general, and due deliberation having been had thereon, it is, on motion of Whitehead & Suydam, attorneys for plaintiff, adjudged and decreed that Richard S. Newcombe and James G. Smith be, and they are hereby, appointed receivers of all the stock, property, and assets, real, personal, and mixed, of the said defendant Bankers' and Merchants' Telegraph Company, with the usual powers and duties of receivers, according to the laws and statutes of this State and the rules and practice of this court, including full power and authority to demand, sue for, collect, receive, and take into their possession all the goods and chattels, rights and credits,
180 moneys and effects, lands and tenements, books, papers, choses in action, bills, notes, and property of every description belonging to the said company, wheresoever situate, and with all the powers and authority and subject to the duties and liabilities of receiver, upon their executing and acknowledging in the usual form and filing with the clerk of the city and county of New York a bond to the people of the State of New York in the penal sum of fifty thousand dollars, with two or more sufficient sureties, freeholders or householders within this State, who shall severally justify, conditioned for the faithful discharge by said receivers of their duties as such and for the due accounting for all moneys or property of every kind received by them as such receivers, which bond is to be approved as to its sufficiency, form, and manner

of execution by a justice of this court; and upon filing said bond so approved the said receivers are hereby authorized and directed to collect and receive all the property of said corporation, preserve the same, and, until the further order of this court, to operate and manage the several lines of telegraph belonging to said defendant or to its subsidiary or adjunct corporations, but managed by it or
181 which were managed by it prior to the 23rd day of September, 1884, and to receive the rents, tolls, and income thereof, and to carry out and perform any and all existing contracts relating to the operation and use of said lines or any thereof, and to maintain and defend any suits, actions, or proceedings which may be necessary for them to maintain or defend; and they are further authorized and directed to employ such agents, attorneys, and servants as may be necessary for the proper discharge of their duties as such receivers.

II. That the said defendant, Bankers' and Merchants' Telegraph Company, and its trustees, directors, managers, and other officers and servants and all other persons be, and they are hereby, enjoined and restrained from exercising any of the corporate rights, privileges, or franchises of the said corporation during the pendency of this action, except by express permission of the court, and from interfering in any manner with said receivers in the discharge of their duties, and from collecting or receiving any debts due said corporation, and from paying out, selling, assigning, or transferring any of the estate, moneys, lands, tenements, or effects of the said corporation, except to said receivers or under the order of this court.

182 III. That the defendants, Richard S. Newcombe and James G. Smith, as receivers, appointed by this court in the action wherein Austin G. Day is plaintiff and The Bankers' and Merchants' Telegraph Company is defendant, deliver over unto themselves, as receivers appointed hereunder, all and singular the rights, properties, and interests which may be or exist in their possession at the time of the entry of this judgement or decree, to have and to hold the same hereunder and under the provisions hereof and as receivers hereunder appointed, to assume the obligations, promises, pledges, and agreements which may have been made by them while acting as receivers under the said appointment in the said action wherein Day is plaintiff and The Bankers' and Merchants' Telegraph Company is defendant; and it is further ordered that the receivership hereby created be, and the same hereby is, extended to and over all property, rights, interests, and matters of every kind, nature, and description whatsoever acquired by the said Richard S. Newcombe and James G. Smith, as receivers, under the order of this court entered in the action wherein Day is plaintiff and The Bankers' and Merchants' Telegraph Company is defendant, without prejudice to such order and proceedings as may have been had in such action.

183 IV. That the said receivers herein appointed be, and they are hereby, authorized, instructed, and directed to issue negotiable receivers' certificates in an amount not exceeding one million five hundred thousand dollars, to be payable at such receivers

may think best and to be redeemable by said receivers at any time, to bear interest at the rate of six per cent. per annum, payable semi-annually, and to contain such conditions as may be deemed by said receivers necessary and requisite, which said issue of certificates shall form and be a first lien upon all the lines, property, assets, and effects, real, personal, or mixed, of the said Bankers' and Merchants' Telegraph Company, and to be paramount to the lien of the general mortgage of ten million dollars ($10,000,000) heretofore executed by the said Bankers' and Merchants' Telegraph Company to the Farmers' Loan and Trust Company, as trustees, but subsequent as a charge, firstly, to the lien of the divisional mortgage executed by said telegraph company to said loan and trust company, upon which there is now due the sum of two hundred and ninety thousand dollars ($290,000) and interest; secondly, to the lien of receivers' certificates, aggregating sixty-five thousand dollars ($65,000), issued in the said action of Day against The Bankers' and Merchants' Telegraph
184 Company for money borrowed by said receivers, with interest thereon; and, thirdly, to the lien of receivers' certificates, aggregating one hundred and thirty thousand dollars ($130,000), issued by said receivers for the redemption of certain lines of telegraph in Pennsylvania, Ohio, and Indiana, with interest, secured by specific mortgage upon the lines so redeemed.

V. That the said receivers be, and they are, authorized and directed to issue the said certificates hereby authorized for debts, claims, and demands of said company or for cash at a discount of not more than ten per cent. below their face value, and with the said certificates or with the proceeds thereof pay, liquidate, settle, and discharge all and singular the following—that is to say:

1. The bonds held and owned by various parties, issued under the divisional mortgage above named, which now constitutes a first lien upon that portion of the telegraph company's line between New York and Washington.

2. The certificates of indebtedness issued by said receivers in the said action of Day against The Bankers' and Merchants' Telegraph Company in any amount of sixty-five thousand dollars, with interest thereon, and also any and all other and further sums which may have been borrowed by said receivers in said action, together with their fees, charges, and disbursements therein.

185 3. The certificates of indebtedness issued by said receivers in the matter of the redemption of the lines and property above named, in the States of Pennsylvania, Ohio, and Indiana, in an amount of one hundred and thirty thousand dollars, with interest thereon, and in discharge of the specific mortgage or lien given thereon and therefor.

4. The salaries and wages due or owing to any of the employees or servants of the said Bankers' and Merchants' Telegraph Company for services rendered to said company or to any of its dependent or subsidiary lines or to the organizations controlled or operated by or leagued with it or rendered to the said receivers in said former action; and also all taxes, rents, disbursements, or expenses connected with or incident to its or their property, offices, or business,

wheresoever the same may be, and all debts or bills due or owing for material and supplies and all and all manner of debts or obligations which may be due or owing in connection with the care, repair, or operation of the lines and either or any of them.

5. The coupons due upon the mortgage bonds of the Southern Telegraph Company, which matured on November 1, 1884, and the coupons due upon the mortgage bonds of the American Rapid Telegraph Company, which matured on September 15, 1884;
186 the said coupons and all of them, however, when cashed and taken up, to be held by said receivers as a debt and demand against the Southern Telegraph Company or the said American Rapid Telegraph Company, as the case may be.

6. The debts, claims, and demands rightfully and lawfully due or owing by the Bankers' and Merchants' Telegraph Company to sundry parties, persons, or concerns, and in such cases as may exist wherein the creditor has obtained a judgement, attachment, or other lien upon property then in extinguishment or discharge of all such liens, claims, and demands, and upon the delivering up to the receivers of all securities or assets which may be outstanding as a collateral for such debts, claims, and demands, and in said connection to pay such costs and charges as may be requisite and necessary in the premises.

7. The necessary expenses, fees, and disbursements in this action now incurred or hereafter to be incurred in carrying the same out and effectuating the provisions hereof, and all such other and further payments or disbursements as may be rendered necessary in redeeming the interests of the said Bankers' and Merchants' Telegraph Company.
187 8. The building, completing, constructing, and equipping of such telegraph lines as were in process of construction on and prior to September 23, 1884, for and under the direction and control of the Bankers' and Merchants' Telegraph Company or its contractors or for its benefit or behoof, to wit, the uncompleted line from Selma, Georgia, to New Orleans, Louisiana, and from Hammond, Indiana, to Chicago, Illinois, and such gaps as may exist between Pittsburgh, Pennsylvania, and Columbus, Ohio, and such other small gaps or breaks as may be elsewhere.

But nothing herein contained is to be construed as directing the said receivers to give any preference to one class over another; but the said receivers shall be at liberty and have full power to pay and discharge any class of creditors or part of a class as and when they shall in their discretion deem it proper, and to so do at the least cost to themselves or said Bankers' and Merchants' Telegraph Company, and in manner, way, and form as may to said receivers seem best.

And, further, the said receivers are hereby instructed and directed not to issue any of the certificates herein provided for, except to pay the expenses of this proceeding, unless they are reasonably satisfied that all the debts, obligations, and liabilities of said Bankers'
188 and Merchants' Telegraph Company can and will be fully extinguished, settled, and provided for, leaving the said com-

pany free, clear, and discharged of debt, saving and excepting, however, the general mortgage bonds which may have been sold, with the interest due or to grow due thereon, and the said certificate so to be issued.

VI. That the acts and doings of said receivers as such, appointed in said suit of Day against The Bankers' and Merchants' Telegraph Company, in making and issuing certificates of indebtedness under orders of this court be, and they are, in all things ratified and confirmed, and that the said receivers shall make up and present unto this court an account of their receipts and disbursements as such.

VII. That the Bankers' and Merchants' Telegraph Company and its stockholders and general mortgage bondholders and the Farmers' Loan and Trust Company, as trustee under the general mortgage mentioned, except the creation and establishment of the lien of the certificates hereby authorized to be issued as a first and paramount lien upon all the property of said Bankers' and Merchants' Telegraph Company in manner as aforesaid.

VIII. That the said receivers herein appointed record and file the said general mortgage heretofore given in such counties and
189 places as it should be recorded and filed, so as to make it a lien and charge upon the property, subsequent, however, to the issue of the receivers' certificates which have been made or shall be made hereunder.

IV. That any party to this action have leave to apply to this court at the foot of this decree for further instructions or order of the court in the premises.

V. That all the parties, plaintiff and defendant, herein have costs, to be taxed by the clerk and to be settled by the receivers herein, as above provided.

VI. That nothing herein contained shall be construed as affecting the priority of the lien of the divisional mortgage until all the bonds under that mortgage are paid.

VII. That the receivers appointed hereunder file a report of their receipts and disbursements at least once in each month, and that, until the further order of this court, upon the filing of the said account by the said receivers from time to time, it be referred to John Whalen, Esq., counsellor-at-law, to take and state the said accounts and pass the same.

(A copy.)

[L. S.] PATRICK KEENAN, *Clerk.*

(Endorsed: Filed January 8, 1885.)

190 All which we have caused by these presents to be exemplified and the seal of our said supreme court to be hereunto affixed.

Witness Abraham R. Lawrence, justice, at the city of New York, the 22nd day of October, in the year of our Lord one thousand eight hundred and eighty-five, of our Independence the one hundred and tenth.

PATRICK KEENAN, *Clerk.*

I, Abraham R. Lawrence, presiding justice of the supreme court of the State of New York for the city and county of New York, do hereby certify that Patrick Keenan, whose name is subscribed to the preceding exemplification, is the clerk of the said county of New York and clerk of said supreme court for said county, duly elected and sworn, and that full faith and credit are due to his official acts. I further certify that the seal affixed to the exemplification is the seal of our said supreme court, and that the attestation thereof is in due form.

Dated New York, Oct. 22nd, 1885.

ABR'M R. LAWRENCE.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

I, Patrick Keenan, clerk of the supreme court of said State
191 in and for the city and county of New York, do hereby certify that Abraham R. Lawrence, whose name is subscribed to the preceding certificate, is presiding justice of the supreme court of said State in and for the city and county of New York, duly elected and sworn, and that the signature of said justice to said certificate is genuine.

In testimony whereof I have hereto set my hand and affixed the seal of the said court this 22nd day of Oct., 1885.

[SEAL.] PATRICK KEENAN, *Clerk.*

EXHIBIT No. 6.

[SEAL.] The people of the State of New York, by the grace of God free and independent:

Know ye that we, having examined the records and files in the office of the clerk of the county of New York and clerk of the supreme court of said State or said county, do find a certain order there remaining in the words and figures following, to wit:

At a special term of the supreme court held at the court-house, in the city of New York, on the 28th day of February, 1885.

Present: Hon. Charles Donohue, justice.

192 AUSTIN G. DAY
vs.
BANKERS' AND MERCHANTS' TELEGRAPH COMPANY.

ALEXANDER H. DE HAVEN
vs.
THE BANKERS' & MERCHANTS' TELEGRAPH COMPANY and Others.

Upon reading and filing the petition of Richard S. Newcombe and James G. Smith, as receivers of the Bankers' and Merchants' Telegraph Company, dated February 27th, 1885, wherein and whereby they submit to the court their present status as receivers and the suggestion made to them that some other person or persons should

be appointed in their place and stead as receivers in the above-entitled actions—

After hearing the attorney general, by William A. Poste, Esq., his deputy, Adrian H. Joline, Esq., of counsel for the plaintiff Day, and Charles C. Suydam, Esq., of counsel for the plaintiff De Haven, George Putnam Smith, Esq., of counsel for the defendant Telegraph Company, and Herbert B. Turner, Esq., of counsel for the defendant Trust Company, and Joseph Fettretch and Angel J. Simpson,
193 of counsel for the receivers, Newcombe and Smith, and due deliberation having been had thereon, it is ordered—

I. That the said Richard S. Newcombe and James G. Smith be, and they are hereby, permitted to resign, and on filing their resignations as such receivers the same are accepted; and that when the accounts of said receivers have been passed and approved by this court their bonds heretofore given to the people of the State of New in the above-entitled actions, and both of them, shall be cancelled and discharged and the sureties thereon released and relieved therefrom.

II. That James B. Butler, Esq., counsellor-at-law, be, and he is hereby, appointed receiver of the said defendant in each and both of the above-entitled actions, with the same power and authority as if his name had been originally inserted in the orders appointing said Richard S. Newcombe and James G. Smith as receivers.

III. That before entering into and upon the discharge of his duties the said receiver so substituted shall execute and acknowledge in the usual form and file with the clerk of the city and county of New York a bond to the people of the State of New York, in the penal sum of fifty thousand dollars, with two or more
194 sufficient sureties, freeholders or householders within this State, who shall severally justify, conditioned for the faithful discharge by the said receiver of his duties as such, and for the due accounting of all moneys or property of every kind received by him as such receiver; which bond is to be approved as to its sufficiency, form, and manner of execution by a justice of this court.

IV. That the said receiver so substituted in the place of the original receivers herein be, and he is hereby, directed to assume all the obligations of his predecessors with the same force and effect as to carrying out the same as if originally entered into by him, and that he be vested with all the power and authority of his said predecessors upon qualifying as above provided.

V. That the said receiver so substituted be, and he hereby is, authorized and directed to forthwith pay unto the persons named in the schedule annexed to the petition of Richard S. Newcombe and James G. Smith hereinbefore mentioned the sums enumerated in said schedule, and for the purpose of providing funds therefor and for operating expenses he is authorized to issue receiver's certificates in the said action of De Haven against The Bankers' and
195 Merchants' Telegraph Company in an amount not exceeding one hundred and twenty-five thousand dollars, which shall be sold at not less than the price of ninety per cent., the same to be and form part of the certificates heretofore authorized by the decree

entered in the action brought by A. H. De Haven against The Bankers' and Merchants' Telegraph Company and others.

All which we have caused by these presents to be exemplified and the seal of our said supreme court to be hereunto affixed.

Witness Abraham R. Lawrence, justice, of the city of New York, the 26th day of October, in the year of our Lord one thousand eight hundred and eighty-five, — of our Independence the one hundred and tenth.

PATRICK KEENAN, *Clerk.*

I, Abraham R. Lawrence, a presiding justice of the supreme court of the State of New York for the county and city of New York, do hereby certify that Patrick Keenan, whose name is subscribed to the preceding exemplification, is the clerk of the said county of New York and clerk of said supreme court for said county, duly
196 elected and sworn, and that full faith and credit are due to his official acts. I further certify that the seal affixed to the exemplification is the seal of our said supreme court, and that the attestation thereof is in due form.

Dated New York, Oct. 26, 1885.

ABR'M R. LAWRENCE, *J. S. C.*

STATE OF NEW YORK, }
City and County of New York, } *ss:*

I, Patrick Keenan, clerk of the supreme court of said State in and for the city and county of New York, do hereby certify that Abraham R. Lawrence, whose name is subscribed to the preceding certificate, is presiding justice of the supreme court of said State in and for the city and county of New York, duly elected and sworn, and that the signature of said justice to said certificate is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court this 26th day of October, 1885.

[SEAL.] PATRICK KEENAN, *Clerk.*

STATE OF NEW YORK, }
City and County of New York, } *ss:*

I, George W. Vultee, a notary public in and for the city and county of New York, duly appointed by the Governor, by and
197 with the consent of the senate, of the State of New York, do hereby certify that on the 26th and 28th day- of October, in the year of our Lord one thousand eight hundred and eighty-five, I was attended by Edward T. Bartlett, Esq., of counsel for the petitioners, and by Robert H. Griffin, of counsel for the receivers, and by the witness, who was of sound mind and lawful age, and the witness was by me first carefully examined and cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, and the deposition was reduced to writing in the presence of the witness, and from his statements, and, after carefully reading the same to the witness, he subscribed the same in my presence; and I do further

certify that I am not of counsel nor attorney for either of the parties in the said deposition and caption named, nor in any way interested in the event of the cause named in said caption.

In testimony whereof I have hereunto set my hand and seal this 30th day of October, in the year of our Lord one thousand eight hundred & eighty-five, and of the Independence of the United States the one hundred and ten.

[SEAL.] GEORGE W. VULTEE,
Notary Public (31), *C. & C. of N. Y.*

198 UNITED STATES OF AMERICA, }
District of Indiana, } ss:

I, Noble C. Butler, clerk of the circuit court of the United States for the district of Indiana, do hereby certify that the above and foregoing is a full, true, and complete transcript of the record in the matter of the intervening petition of James E. Vane, in the cause of The Bankers' and Merchants' Telegraph Company *vs.* The Bankers' and Merchants' Telegraph Company, as fully as the same appears of record in my office.

Witness my hand and the seal of said court this 27th day of July, A. D. 1886.

[Seal Circuit Court of the United States, District of Indiana.]

NOBLE C. BUTLER, *Clerk.*

Endorsed on cover: Indiana C. C. U. S. No. 334. James E. Vane, appellant, *vs.* Richard S. Newcombe & James G. Smith, receivers of the Bankers' and Merchants' Telegraph Company of New York. Filed September 10, 1886.

SUPREME COURT OF THE UNITED STATES.

JAMES E. VANE, Appellant,

vs.

RICHARD S. NEWCOMBE AND JAMES G. SMITH, RECEIVERS, ET AL.

No. 334.

IN THE MATTER OF THE INTERVENING PETITION OF JAMES E. VANE.

APPELLANT'S BRIEF.

I. STATEMENT.

1. The Constitution of Indiana provides:

"Corporations, other than banking, shall not be created by special act, but may be formed under general laws." (Art. 11, Sec. 13, R. S. 1881, Sec. 212.)

2. A general law was passed March 11, 1867, authorizing the creation of telegraph companies. (R. S. 1881, Sec. 4162 *et seq.*)

Section seven of the Act declares:

"All telegraph companies organized under this act, shall have power to lease or attach to other telegraph lines, by lease or purchase." (R. S. 1881, Sec. 4168.)

3. The Bankers' and Merchants' Telegraph Company of the State of New York was organized under the laws of that State for the purpose of owning and operating a system of telegraphy throughout the United States.

4. The Bankers' and Merchants' Telegraph Company of Indiana was organized under the Statutes of Indiana.

For the sake of brevity these corporations will be called the New York Company and the Indiana Company.

II. Pleadings.

On October 4, 1884, the Indiana Company filed a bill in the Circuit Court of the United States for the District of Indiana against the New York Company, stating in substance that the New York Company, as the principal, parent, or head corporation, controlled corporations of the same name in the States of Massachusetts, Connecticut, New Jersey, Pennsylvania, Delaware, Ohio, Indiana, Illinois, Michigan, Tennessee, Kentucky, Texas, New Hampshire, District of Columbia, City of Baltimore and elsewhere; that the New York Company had become insolvent, and in the case of Day, against that Company in the Supreme Court of the State of New York, Richard E. Newcombe and James G. Smith had been appointed receivers of the New York Company.

The bill then recites:

"Your orator further shows that the said Bankers' and Merchants' Telegraph Company of New York has partially constructed the lines of your orator, and operates and manages the same, and does a telegraph business in all the States above named, with the principal office for the transaction of business, for the executive management, and for the receipt and disbursement of all money, in the city of New York.

"Your orator further shows that in the construction, management, and operation of the lines of your orator *the said Bankers' and Merchants' Telegraph Company of New York has incurred several certain debts to divers persons and corporations, the amount of which debts and the names of such creditors are now to your orator unknown;* that the said debts or portions thereof are claimed to be in law and equity just obligations against the property of your orator."

The bill further recites that the Indiana Company was ignorant of the state of the accounts between the two corporations, or what portion of said telegraph line was the property of the complainant and what portion was distinctly the property of the New York corporation; that it was important that the unity of the telegraph system should be maintained; prayer for an accounting, etc., and

that the New York receivers should be appointed receivers of the Indiana Company. (Tr. pp. 1 to 4.)

On the filing of the bill the New York Company appeared by counsel and filed an answer admitting the truth of the bill, and thereupon the said New York receivers were appointed "receivers of all and singular the lines, property and assets, real, personal or mixed, of the complainant, the said Bankers' and Merchants' Telegraph Company of Indiana, and respondent, the said Bankers' and Merchants' Telegraph Company of New York," etc. (Tr. p. 4, folio 10.)

Said receivers qualified and took possession of the property in Indiana on October 14, 1884. (Tr. folio 12.)

III. Vane's Intervening Petition.

On March 7, 1885, James E. Vane filed his intervening petition, stating:

1. That prior to May, 1884, the New York Company had built, and was operating as a part of its system, a line of telegraph (four wires) from Freeport, Wood county, Ohio, to Hammond, Lake county, Indiana, and so continued until the appointment of said receivers.

2. That on the 17th of June, 1884, the New York Company employed him to put six additional independent wires on the telegraph poles from Freeport to Hammond; the company agreeing to furnish the wires and other materials at the nearest distributive points (depots) along the line, freight charges paid, and there deliver the same to him free of any charges or expense. From whence he was to take the wires, arms, etc., and string the same on the said line of poles at a compensation of $45 for every mile of wire so put and strung. (Tr. p. 6 folio 15.) Also, to string two wires from Hammond to Chicago. (Tr. p. 7, folio 17.)

3. That by September 27, 1884, Vane had nearly completed the work, two wires only being unstrung between Lake Station and Hammond, a distance of sixteen miles.

That the company failed to pay him for his labor and certain sums of money advanced at its request to pay freight and the like,

aggregating in all about $16,000; that before and at the time of the appointment of the receivers, he "held physical possession of all the said wires which formed the six connecting and continuous lines between the points aforesaid; and so having possession, refused to deliver the same to said telegraph company, or to any person in its behalf, but held the same for the purpose of protecting himself for the money then due and owing to him."

4. That after the receivers were appointed they made with him the following agreement:

"CHICAGO, ILL., Nov. 19, 1884.

"It is hereby agreed and understood that the telegraph wires on the poles of the Bankers' and Merchants' Telegraph Company in the State of Indiana, which were strung by J. E. Vane, and upon which he claims a lien, shall be connected up with the wires of the said company from Hammond, Indiana, to Chicago, Illinois, now constructed and to be constructed, and shall be used for telegraph business by the receivers of said company; but it is also expressly understood that such use of said wires shall not be construed in any way or to any extent as impairing or interfering with the lien of the said Vane thereon.

"(Signed) "RICHARD S. NEWCOMBE,
"JAS. G. SMITH,
"*Receivers.*"

And he then and there surrendered the wires upon the terms thereof and not otherwise. Also, that he had completed the line therefor at their request under said control, and had done certain work for the receivers in Illinois between Hammond and Chicago, amounting to $560.00.

5. That in the month of September, 1884, and before the appointment of the receivers, he gave notice, and filed liens in the several counties in Indiana, through which the line passed, under the Statutes of Indiana, to be hereinafter set forth. That in October he had settled his accounts with one Robert Stewart acting for the receivers, which had been approved. And that the receivers refused to pay him or turn the wires back to his possession.

6. Prayer: (1) That he might be permitted to enforce the statutory liens by suit in the Courts of the State; (2) or that the Court would permit him to retake possession of the wires surrendered under the agreement of November 19, 1884, or if denied then

(3) that he be allowed a lien on said wires for the payment of the sums due him, or so much thereof as to the Court might seem equitable and just. (Record pp. 6 to 12; inclusive Exhibits to intervening petition pp. 12 to 18 inclusive).

7. On the filing of the petition the Court made the following order:

"Ordered, 1. That said petitioner have leave to file said petition, subject to all rights of said receivers to object thereto hereafter.

"2. That the said Richard S. Newcombe and James G. Smith, receivers of said Bankers' and Merchants' Telegraph Company, appear to and answer the said petition of said James E. Vane within thirty days from the date of service of notice of this order upon them, and the clerk of this court is directed to certify and mail a copy of this order to them forthwith.

"3. That the request of said petitioner, to proceed in the counties named in the petition to establish his rights in the proper courts of the State under the alleged lien notices against the property and earnings of said Bankers' and Merchants' Telegraph Company, is hereby denied. (Tr. p. 5, folio 13.)

ANSWER.

On May 2, 1885, the receivers filed an unverified answer in five paragraphs:

1. General denial.

2. Payment.

3. Denying that Vane was an employe within the meaning of the Statute.

4. Denying that Vane had a first lien, because, prior to the filing of the intervening petition the Supreme Court of New York and the Circuit Court of the United States for the District of Indiana had issued receivers' certificates to the amount of $150,000, which were outstanding and constituted a first lien on the property.

5. Before the rendering of the services by Vane, the New York Company had made "a general mortgage upon all and singular its property in the State of Indiana, as well as other States," securing bonds outstanding and unpaid, amounting in the aggregate to $10,000,000. (Rec. p. 19.)

Vane filed a general replication.

On May 6, 1885, the Circuit Court made an *ex parte* order, legalizing receiver's additional certificates to the amount of $470,052.06, issued in New York on January 5, 1885, and making this issue a preferred lien on the line to all liens and claims except the first issue above named. Vane was not present when this order was made, and had no notice thereof. (Record p. 21.)

On May 16, 1885, the matter of Vane's petition was referred to W. P. Fishback, Master, to take and report the evidence, together with his findings thereon. (Record p. 22.)

IV. Master's Report.

On January 30, 1886, the Master filed his report, as follows:

"*To the Honorable Court:*

"The undersigned, the Master to whom said petition was referred, now respectfully reports to the Court, as follows:

"I was attended at the hearing by Mr. Calkins for petitioner and by Mr. Miller for respondents.

"The evidence produced at the hearing consists of the following items, viz.:

"Evidence of James E. Vane, taken before me, at Indianapolis May 21, 1885, with exhibits thereunto, and referred to in said evidence.

"Depositions of Edward S. Pigott, taken before George W. Vultee, with exhibits filed in this cause November 4, 1885.

58 "Depositions of Jas. G. Smith and Robert Stewart, taken before Charles Nettleton, notary public, and published in this cause July 29, 1885.

"All of said evidence is filed in court, with this report as a part thereof.

"Mr. Vane, the petitioner, was employed by the telegraph company to put on arms and insulators and to string additional wires on the poles of the company from Freeport Junction, Ohio, to Lake Station, Indiana, a distance of 248 miles, for $45 per mile. The company agreed to furnish and deliver to Vane, at the nearest accessible railway stations, all the necessary material for the work. Vane was to do or furnish the labor necessary to string the wires, etc. He did the work, hiring men for the purpose and assisting in person. The amount owing to him on this account is eleven thousand one hundred and sixty dollars ($11,160.00.)

"He also put in cross-arms and insulators and strung four wires from Lake Station to Hammond, sixteen miles, at thirty-seven dollars and fifty

cents per mile, the company furnishing material and Vane doing or furnishing the labor. The amount owing to him on this account is six hundred dollars ($600.00.)

He also strung two wires from Hammond to the junction of the
59 Chicago Board of Trade lines, 28 miles, at $20 per mile, for which there is due him five hundred and sixty dollars ($560.00.)

"During the progress of the work the company failed to furnish the material as it was required, so that the men working for Vane were without employment a portion of the time. Vane asked for instructions and was directed by the company to keep his men together during the delay thus caused, it being the understanding that the company would pay their board while they were waiting. The Master is of the opinion that it is to be fairly inferred from the evidence that the company would pay for the time thus lost, Vane being required to pay his men as if they were at work.

"Vane also made some advances for freight on material shipped to him, but which he could not obtain possession of until the freight was paid. He also paid out various sums of money for livery hire, telegrams, etc., made necessary by the company's failure to furnish material promptly.

"He also did extra work on the line, at the request of the company, which was not covered by the original agreement.

60 "The amount due him for this extra work and for the time of his men lost by delay is $1,951.12.

"The amount due him for cash advanced to pay freight, livery hire, telegrams, etc., is $1,298.50.

August 11, 1884, he was paid	$300 00
September 11, 1884, he was paid	200 00
Total credits	$500 00

"Exhibit No. 1, which was filed March 7, 1885, contains all the foregoing items in detail and has been audited and approved by the company. There is no controversy as to the amount.

"The only real question is as to what preference or lien, if any, has the intervener.

"The Master is of the opinion that in doing this work Mr. Vane was an employe of the company within the meaning of section 5286, Revised Statutes of Indiana (1881.) He has filed his notice, as required by section 5287, in the counties through which the telegraph is built.

"This lien covers the following items:

For stringing wires, 248 miles, $45 per mile	$11,160 00
For putting in cross-arms from Lake Station to Hammond	600 00
For stringing two wires from Hammond to Junction, etc.	560 00
For extra work and delay	1,951 12
61	$14,271 12
Deduct credits	500 00
Balance due	$13,771 12

"I find and report that he has no lien as to the sum of $1,298.50 for cash paid for freight, livery, etc.

"Vane's claim accrued prior to the order made by the Supreme Court of New York November 3, 1884, authorizing the issue of $150,000 of special receivers' certificates, to secure which a trust deed or mortgage was executed, and I report and find that for said sum of $13,771.12 Vane is entitled to priority over the lien of the certificates above named.

"Vane also asserts a right to a common-law lien, which he bases on the following facts which are not controverted: The contract with Vane was made in June, 1884. November 12, 1884, the work was practically done, but the connections were not made. Mr. Vane kept possession of the wires by refusing to allow connections to be made, and turned the ends of the wires down into the ground. He retained such possession until November 20, 1884, when he delivered possession to the re-
62 ceivers with an agreement that such delivery was not to impair any rights or liens he might thus have by virtue of such possession. He had such possession when the order allowing the issue of receivers' certificates was made and also when the certificates were issued, Novembe 11, 1884.

"I report and find that by perfecting his claim for a lien under the statute Mr. Vane waived the right he had, if any, to assert his common-law lien.

"In addition there is due to Vane from the receivers for work done for them $1,898.33. The work was done after the certificates were authorized by the order of November 3, 1884, but before the issue of the certificates issued by subsequent orders. I report and find that for the sum last named Vane should be postponed as to the issue of $150,000 of certificates, but that he should be preferred as to those which were subsequently issued.

"Transcripts of the various orders of the Supreme Court of New York authorizing the issue of receivers' certificates are attached to the deposition of Mr. Edward Piggott, filed herewith.

"Respectfully submitted, WILLIAM P. FISHBACK, *Master*."

On February 4, 1886, the receivers filed exceptions on the ground that Vane was not an employe under the Statutes of Indiana as hereinafter set out. (Rec. p. 23.)

On February 11, 1886, Vane filed exceptions as follows:

67 "James E. Vane excepts to the Master's report and finding herein filed in his matter on the 30th day of January, 1886, in this court, and for grounds of exception thereto says:

"*First.* For that said Master has certified that he, said Vane, is not entitled to a lien on the property of said Bankers' and Merchants' Tele-

graph Company prior and paramount to the holders of receivers' certificates and prior and paramount to all other mortgage liens for the sum of $13,771.12, for work and labor done and performed for said company, under the lien laws of this State, whereas the Master should have found and reported that said Vane was entitled to a prior and *paramount* lien over all of said other liens mentioned for the full sum found to be due him, to wit, the sum of $15,069.62.

"*Second.* The Master erred in deducting the payments of $500 from the amount found and reported to be a *paramount* lien over said receivers' certificates, whereas if his report concerning said amount is correct
68 under the evidence he should have deducted said payment from the $1,297.50, which he found and reported to be due from the Bankers' and Merchants Telegraph Company, but which was entirely unsecured.

"*Third.* The master erred in reporting and certifying that said $1,298.50 was entirely unsecured, whereas he should have found and certified that said sum, together with all other sums found to be due, as shown on Exhibit No. 1, filed with said petition, was either secured and paramount to said other liens under the mechanics' and employes' law of this State, or was secured and was paramount to said other liens under his common law lien, as shown by the evidence.

"*Fourth.* The Master found and reported that a part of said sum found to be due and owing to said Vane, to wit, the sum of $13,771.12, was secured by a lien under the Statute of this State paramount to the lien of the receivers' certificates, whereas the Master should have found and reported that the whole sum found to be due said Vane, as shown on and by said Exhibit No. 1, filed with the petition, was para-
69 mount to said lien of said receivers' certificates by virtue of the agreement made with said receivers and by virtue of his possession, asserted and held against said receivers and all other persons, as shown by the undisputed testimony in said suit.

"Wherefore said Vane excepts to said report of said Master and humbly prays an appeal therefrom to the judgment of this honorable Court.

"JAMES E. VANE,
"By HARRIS & CALKINS,
"*Solicitors, etc.*"

ACTION OF THE COURT.

On May 6, 1886, the Court made the following order:

"Come now the parties, complainant and defendant, and comes now James E. Vane, intervening petitioner herein, and come also Richard S. Newcombe and James G. Smith, the receivers of the Bankers' and Merchants' Telegraph Company of New York.

"And the Court, being sufficiently advised in the premises, doth
70 now overrule the exceptions of said petitioner to the report of William P. Fishback, Master, filed herein, and doth also sustain so

much of the exceptions of the said receivers to said report of the Master as relates to the claim for a lien in favor of said petitioner as found by him, the said Master, in said report, but confirms said report as to the amounts found to be due to said petitioner.

"It is therefore ordered, adjudged, and decreed by the Court that said James E. Vane, petitioner, has a just claim against the Bankers' and Merchants' Telegraph Company of New York for the amount found to be due him from said company by the Master, being the sum of $15,069.62, and that he has a just claim against said receivers for work done for them as found by said Master, amounting to the sum of $1,898.33.

"And it is ordered, adjudged and decreed by the Court that said petitioner, James E. Vane, has no lien upon the property of said Telegraph Company, defendant, for the amount so found to be due him or any part thereof, and that said sum of $15,069.62 is a general floating debt of said contracting corporation not entitled to any priority in preference, and that said sum of $1,898.33 is a valid debt of said receivers payable out of any sums in their hands as such, available for payment of the debts of said trust. (Tr. p. 27.)

Appeal.

Vane was allowed an appeal to this Court from so much of said decree as disallowed his claim for a lien for said sum of $15,069.62, and from the overruling of his several exceptions to the Master's Report, and sustaining the exceptions of said receivers thereto. (Tr. pp. 27–28.)

Assignment of Errors.

The Circuit Court of the United States for the District of Indiana erred:

1. In sustaining the first exception of the appellees to the Master's Report, thereby holding and adjudging that Vane was not entitled to have and hold a lien upon the property of the company in the counties through which the telegraph line was built under the laws of Indiana.

2. The Court erred in sustaining so much of the second exception of the appellees to the Master's Report as declared that said Vane was not an employe of said company within the meaning of said Statutes of Indiana.

3. The Court erred in finding and adjudging that the appellant Vane had no lien either at common law or by statute upon the pro-

perty of the said company for the sums found and adjudged due him for work and labor performed by him upon the line.

4. The Court erred in overruling appellant's first exception to the Master's Report, thereby holding and adjudging that Vane's claim to the amount of $13,771.12, was not a paramount lien on the property of said company to any and all other liens thereon.

5. The Court erred in overruling appellant's third exception to the Master's Report, thereby holding and adjudging that said Vane had no lien on the property of said company for the sum of $1,298.50 cash paid out by him for freight and other expenses which should have been paid by the company.

6. The Court erred in overruling the fourth exception by appellant to the Master's Report, thereby holding and adjudging that said Vane had no lien upon said property of said company by virtue of the said agreement made with the receivers of date November 19, 1884.

7. The Court erred in adjudging that "James E. Vane has no lien upon the property of said Telegraph Company for the amount so found to be due him or any part thereof, and that said sum of $15,069.62 is a general floating debt of said contracting corporation, not entitled to any priority or preference."

Wherefore appellant asks that the judgment may be reversed, and that the Circuit Court be directed to render judgment in favor of appellant, that he has a lien on said property under the law, and by virtue of said agreement of November 19, 1884, for said several sums of money adjudged to be due him.

And will the Court make such further orders and judgments as equity doth require.

JAMES E. VANE,
By ADDISON C. HARRIS,
His Attorney.

Judge Woods' opinion is reported in 27 Fed. Rep. 536. It will be conceded if Vane has a lien in law or equity he sought the proper Court in which to secure his rights.

Blair v. *St. L. H. & K. R. R. Co.*;
17 *Am. & Eng. R. R. Cases*, 337.

Argument.

Appellant maintains three propositions:

1. Vane has a lien under the Statutes of Indiana.

2. If not, then he has a lien at common law, or in equity.

3. He also has a lien by virtue of the contract of November 19, 1884.

We will discuss these questions in the order named.

I. Vane has a Statutory Lien.

W. P. Fishback, Esq., Master, states in his report that Vane has a statutory lien for $13,771.12 for work and labor, etc., but not for $1,298.50 cash advanced for freight, etc. His honor, Wm. A. Woods, District Judge, presiding at the trial, holds that Vane has no lien. To a full discussion of this question it becomes necessary to refer to the policy of, as well as to set forth the Statutes of Indiana. Since the organization of this State it has been the uniform and continuous policy of this State to secure mechanics, laborers and the like in their pay for work and materials incorporated into the property of another. (R. S. 1838, p. 412.) (R. S. 1843, p. 777.)

In the revision of 1852, Art. 36, of the Civil Code was devoted entirely to this subject. 2 Gavin and Hord's Stat., p. 298. Thereafter from time to time additional laws were passed, extending this wholsome policy to exceptional cases not embraced by the general provisions of the law of 1852. In this way our system of securing the pay of contractors, material-men, employes and laborers has grown into a pretty complete code. The various Acts are scattered throughout the session laws since 1852; but they are collected and compiled in the later revisions of 1881 and 1889.

See R. S. 1881, "Laborers," Chap. 75, Sec. 5206.
Id. "Liens," Chap. 79, Secs. 5276 to 5311.
Id. "Mines," Chap. 86, Sec. 5471.
Elliott's Sup. (1889) "Labor" Ch. 28, Sec. 1596, *et seq.*
Also Secs. 1092 and 1094. Also Ch. 31, Sec. 1688 to 1712.

It is unnecessary to copy these laws as the merest glance at the Statutes will support our general proposition that the policy of this State is to secure the pay of all persons employed as contractors, material-men, laborers or otherwise. And the Courts of the State are in full sympathy with the legislative purpose, and construe the Statutes liberally to fulfill the intent of the law-making power. This purpose was forcibly expressed by Judge Worden in *Colter* v. *Freese*, 45 Ind. 96, (1873.)

He said :

"There is a striking analogy between the Statute and the principles of the civil law, including the maratime, in respect to liens." Thus says Domat, (Vol. 1, p. 683, Art. 9, par. 1774:)

"Architects and other undertakers, workmen and artificers who bestow their labor on buildings, or other works, and who furnish materials, and in general all those who employ their time, their labor, their care, or furnish any materials, whether it be to make a thing, or to repair it, or to preserve it, have the same privilege for their salaries, and for what they furnish, as those have who have advanced money for these kinds of works, and which the seller has for the price of the things sold." (Page 105.)

This "privilege" or lien under the civil law is given before all other liens, on the principle that in good conscience a man does not own what he has gotten from another until it is paid for. Domat, Sec. 1743. Vendors, maratime and mechanics' liens repose on this doctrine.

Statutes for the benefit of laborers, and the like, secure a liberal construction in this Court.

Davis v. *Alvord*, 95 U. S., 545 ;
Mining Co. v. *Cullins*, 104 U. S., 176.

So we have the same policy prevailing in Indiana, and in the federal system. In the light of this policy let us now turn to the special Act which the Master holds, and we contend, gives Vane a lien on the property of the telegraph company. And, first, as to its history, for the Act being remedial must be so construed (if possible) as to make it effect the evident purpose for which it was enacted.

Platt v. *Railroad*, 99 U. S., 60 ;
Con. Mut. Life Ins. Co. v. *Talbott*, 113 Ind. 373 ;
Stout v. *Board*, 107 Ind. 343 ;
Edger v. *Board*, 70 Ind. p. 338.

"Courts in construing a Statute may with propriety recur to the history of the times when it was passed; and this is frequently necessary in order to ascertain the reason, as well as the necessity of particular provisions in it."

U. S. v. *U. P. R. R.*, 1 Otto, 79;
Maryland v. *R. R. Co.*, 22 Wal., 113;
Railway v. *Prescott*, 16 Wal., 609;
Preston v. *Brouder*, 1 Whart., 121.

So again:

"Acts *in pari materia* passed either before or after, and whether repealed or still in force, may be referred to in order to discern the intent of the Legislature in the use of particular terms, or the enactment of particular provisions."

Stout v. *Board*, 107 Ind., p. 348.

Looking at the various laws enacted before 1877 we find that all persons engaged in constructing any building (Act 1853), railroad (1873), boat (1863), or any article of personal property; agistors, attorneys, bailees, warehousemen, etc., were protected by the State. The financial distress of these years fell heavily upon the workingmen, and particularly those whose labor was not secured by Statute. Labor incorporated into a telegraph line is as much entitled to protection as if done on a building, railroad or boat, or in a law suit. And in morals, those operating a railroad or factory, seem, to many, at least, to have as much claim to protection as those engaged in constructing or repairing the plant itself. Labor creates wealth. And for its encouragement and assurance its value is made a charge on that which it creates. The financial condition of a citizen is generally known to his neighbors, but that of a corporation, particularly if it is a foreign one, doing business in this and other States with its offices in New York or elsewhere, is unknown to the masses, if not to every one.

But the chief purpose of such Statutes is to prevent those persons whose labor is indispensable to the continuance of a corporation from abandoning it, and thus suspending its operations whenever they become alarmed by fear of losing their pay.

Lehigh Coal etc., Co. v. *Cent. R. R. Co.*, 2 Stew. 252;
Watson v. *Mfg. Co.*, 30 N. J. Eq. 588.

The "six months' rule" in railway receiverships reposes upon the same wholesome policy.

It seems to have been the purpose of the Legislature of 1877 to combine these purposes in one general Act, the first section of which is No. 5286 R. S., under which the Master held Vane had a lien.

The law is as follows:

"AN ACT giving the employes of corporations a lien for their *work and labor* upon the corporate property of such corporation, and the earnings thereof, together with the mode of enforcing same, and repealing all laws in conflict therewith.

[APPROVED MARCH 13, 1877.]

"SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That the employes of any corporation doing business in this State, whether organized under the laws of this State or otherwise, shall be, and they are hereby entitled to have and to hold a first and prior lien upon the corporate property of such corporation, and the earnings thereof, for all *work and labor done* and performed by such employes for such corporation, from the date of their employment by such corporation; which lien shall lie prior to any and all liens created or acquired subsequent to the date of the employment of such employes by such corporation, except as in this act provided.

"SEC. 2. Any employe wishing to acquire such lien upon the corporate property of any corporation, or the earnings thereof, whether his claim be due or not, shall file in the Recorder's office of the county where such corporation is located or doing business, notice of his intention to hold a lien upon such property and earnings aforesaid for the amount of his claim, setting forth the date of such employment, the name of the corporation and the amount of such claim; and it shall be the duty of the Recorder of any county, when such notice is presented for record, to record the same in the record now required by law for notice of mechanics' liens, for which he shall receive twenty-five cents; and the lien so created shall relate to the time when such employe was employed by such corporation, or to any subsequent date during such employment, at the election of such employe, and shall have priority over all liens suffered or created thereafter, except other employes' liens, over which there shall be no such priority; *Provided*, That where any person, other than an employe, shall acquire a lien upon the corporate property of any corporation located or doing business in this State, and such lien remain a matter of record for a period of sixty days, in any county in this State where such corporation is located or doing business, and no lien shall have been acquired by any employe of such corporation during that period, then and in that case such lien so created shall have priority over the lien of such employe

in the county where such corporation is located or doing business, and not otherwise; *Provided, further*, That this section shall not apply to any lien acquired by any person for purchase money.

"SEC. 3. Any employe having acquired such lien may enforce the same by filing his complaint therefor in the Circuit or Superior Court in any county where such lien was acquired, at any time within six months from the date of acquiring such lien, or if a credit be given, from the date of such credit; and the Court rendering judgment for such claim shall declare the same a lien upon such property, and order the same sold to pay and satisfy such judgment and costs as other lands are sold on execution or decree, without relief from valuation or appraisement laws, and in such action the Court shall make such orders as to the application of the earnings of such corporations, if any there be, as shall be just and equitable, whether the same be asked for in the complaint or not.

"SEC. 4. In such actions all persons whose liens are recorded, as provided in section two of this act, may be made parties to such action, and issues shall be made up, and trials had, as in other cases; and the Court may, when several actions are pending by different claimants to enforce such liens, order that such cases be consolidated, and if the proceeds of the sale of such property, or the earnings of such corporation be insufficient to pay and satisfy the claimants in full, the Court shall order them to be paid in proportion to the amount due each, and such sale shall be made without prejudice to the rights of any prior incumbrances, owner or other persons not parties to the action.

"SEC. 5. In all proceedings commenced under this act, the defendant may file a written undertaking, with surety to be approved by the Court, in the exercise of sound discretion, to the effect that it will pay the judgments that may be recovered, and costs, and thereby release its property from the liens hereby created.

"SEC. 6. In all cases not herein specially provided, the law, rules, practice and pleadings now in force in reference to the enforcement of mechanics' liens, shall be applicable to all suits commenced under this act.

"SEC. 7. All laws or parts of laws coming in conflict with the provisions of this act shall be and the same are hereby repealed." (Acts 1877, Special session, p. 27.)

A similar law has been held valid. *Warren* v. *Sohn*, 112 Ind. 213.

This Act for the first time introduced the word "employe" into the lien laws of this State. In the embezzlement Act of 1865, (Acts 1865, Spec. Ses. p. 204), it was used as embracing the president, directors, cashier, secretary, treasurer, teller, clerk, bookkeeper, agent and others in the employe of any corporation or person in business. In subsequent criminal Statutes it still holds the same

place broadened to embrace many other persons. (R. S. 1881, Secs. 1944, 1946, 1948, 3645.)

It is evident the word was not used in any limited sense in this Act; although, if Vane had appropriated the wire before it was strung he might have been guilty of embezzlement. (See *Ritter* v. *State*, 111 Ind. 324.) This word has recently come to us from a foreign tongue, but is given a broader meaning in this country than its natural definition. Its brevity has led to its adoption in our tongue as it comprehends many classes of persons which otherwise we must name, respectively. A half a century ago it was styled an equivocal word. (Bayley J. in *Ripley* v. *Scaife*, 5 B. & C., 167.)

It is now in such universal use that it is not subject to criticism. Before the passage of this Act the Statutes would not reach a telegraph company, roads, bridges, etc., as they were not buildings, nor work or repairs on railroads after they were in operation, (Sec. 5293 and 5301) and many other instances within the policy of the State. And there was no security for the claims of operatives. That class of employes does not fall within this discussion, as Vane was not a telegrapher operating the line. He was not in the exclusive possession of the line, like a building contractor. The company furnished the material and employed him to put it in place on the property of the company. We have corporate shoe factories in this State as well as other manufacturing corporations. Now, if a corporate shoe manufacturer employs a shoemaker to come into its shop and make shoes for it out of materials furnished by it, will any one say he is not an employe? Or can any man point to any difference in their legal relations between the shoemaker and Vane? It is not necessary to make one an employe that he should work for so much per day. One who does "piece work" is none the less an employe. Railway employes in train service are now almost uniformly paid by the miles run, and most artisans are paid by the piece. There is no difference in principle between the "miles run" by an engineer and the "miles strung" by Vane. If Vane had strung by himself the company's wire on the company's poles, no one would have questioned that he was an employe, any more than a railway trackman laying down a third rail on a road in operation (as the telegraph line was) is an employe, whether he is paid by the day or by the mile. But

inasmuch as Vane "did the work, having men for the purpose," to help him, it was said, and may be again, that he was not an employe. This is to make a man's legal relations to his employer turn on who furnishes the help. The shoemaker, so long as he works in his corporate employer's shop alone is an employe, but if he brings somebody to wax his thread, he is no longer an employe. It matters not whether Vane does all the work himself, or does it with the help of his sons, apprentices or hired help. Thus a Statute of Wisconsin gave a lien upon logs for the "labor and services" in cutting and hauling. It was held that the Statute "should be construed as broadly as its common use will warrant, which would include such labor and services when performed by servants and agents as well as personally, as in the common count in *assumpsit* for work and labor."

Hogan v. *Cushing*, 49 Wis. 169.

The Employers and Workmen Act of 1875 (38 and 39 Vict. C. 90), providing for a summary settlement of labor disputes, declared "the expression, 'workman' * * * means any person, who, being a laborer, servant in husbandry, journeyman, artificer, handi-craftsman, miner or otherwise engaged in manual labor * * * has entered into, or works under a contract with an employer, whether the contract be * * * a contract of service or a contract personally to execute any work or labor."

A potter's printer was held to be a "workman," who employed and paid assistants to help him perform and fulfill a contract with his employer.

Gramger v. *Ayrsley & Co.*, 6 Q. B. Div. 182;
Mining Co. v. *Cullins*, 104 U. S. 176;
Munger v. *Senroot*, 32 Wis. 541;
Watson v. *Manuf. Co.*, 30 N. J. Eq. 588;
The Queen v. *Freke*, 5 El. and Bl. 944.

It will be observed that the words "master," "laborer," "servant," "wages" are not used in the Act under review; but the words are "employment," "employee," "claim," "whether his claim be due or not." These terms imply contracts. A "claim" includes much more than unpaid wages. It is the most comprehensive term

in our language to define a money obligation. So the word "employee" is the most comprehensive to define persons rendering services for another, and is the correlative of employer. And such is the holding of the Courts.

In *Woodstock Iron Co.* v. *Richmond and Danville Extension Co.*, 129 U. S. 643, the Georgia and Pacific Railroad Co. had employed the Extension Company to construct its railroad from Atlanta, Ga., to Columbus, Miss.

The Extension Company made a contract with the Iron Company to locate and construct the line by way of its works at Anniston for a sum of money to be paid by the Iron Company to the Extension Company. In speaking of this contract this Court say:

"It was a contract by an *employe* of a railroad company with a third party for a consideration to be received from that third party to violate its engagement with its *employer*."

The word employe is here used to comprehend a contractor, so that if Vane was a contractor he was none the less an employe. The word is now used to define all persons employed, whether contractors, professional men, laborers, servants, agents, operatives or officers.

Thus in the case of *Gurney* v. *The Atlantic and Great Western Railway Co.* 58 N. Y., 358. The receiver was ordered to pay and discharge "arrearages owing to laborers and employes of the said consolidated corporation, defendants for labor and services actually done in connection with that company's railways."

Jeremiah S. Black filed a claim as an employe for professional services, as counsel for the railway company, in the sum of $5,000, prior to the appointment of the receiver. The Master, to whom the matter was referred, reported the claim was reasonable, but rejected it solely on the ground that Mr. Black was not an "employe." He appealed. The Court of Appeals allowed the claim.

Church, C. J., said: "It is manifest that literally and lexically the claimant was an employe of the company; that is, he was employed by and rendered important service for them." And he points out with great clearness that the word "employe," as commonly understood, has a wider signification than laborer, servant, apprentice, operative and the like. (Page 366–7.)

Allen, J., said:

"'The term 'employe' is the correlative of 'employer,' and neither term has either technically or in general use a restricted meaning by which any particular employment or service is indicated. The terms are as applicable to attorney and clerk, physician and patient, as to master and servant, a farmer and day laborer or a master-mechanic and his workmen. To employ is to engage or use another as an agent or substitute in transacting business, or the performance of some service; it may be skilled labor or the service of the scientist or professional man, as well as service or unskilled manual labor. That the claimant was the 'employe' of the corporation and 'done service' under his employment can not be questioned upon the evidence and under the finding of the referee." (Page 371.)

In another case a newspaper was held to have been "employed by the corporation" when it had been designated by the Mayor as the official paper of the city of New York.

Petition of Wm. B. Astor, etc., 50 N. Y., 363.

In *Stryker* v. *Cassidy*, 76 N. Y. 50, under a Statute giving a lien to "any person who shall perform any labor, or furnish any materials, etc.," it was held that an architect was within the intent of the law.

"Looking at the whole Act, it is plain," says Andrews, J., "that it was not passed simply for the protection of laborers, using that word in a restricted sense, as designating those who work with their hands, and are dependent upon their daily toil for their subsistence. Mechanics' lien Acts were originally enacted for the especial protection of this class of persons, but their scope has been greatly extended. Under the Act in question a lien may be created, not only in favor of workmen employed by a contractor, but in favor of the contractor also. * * The right to acquire a lien is not confined to persons who may be supposed to need the especial protection of the State. The general principle upon which the lien laws proceed, is that any person who has contributed by his labor, or by furnishing materials to a structure erected by an owner upon his premises, shall have a claim upon the property for his compensation."

Water Co. v. *Ware*, 16 Wall. 566, Phil. Mec. Liens, p. 57; *Stone* v. *U. S.*, 3 Ct. Cl. 260.

The Indiana "Miner's Law" was passed in 1879. It gives (Sec. 5471 R. S. 1881) to "miners and other persons employed and work-

ing in and about the mines" a lien for "work and labor performed" on the mines, paramount over all other liens. In a suit to enforce certain mortgages and liens, it appeared that Kratz Bros., foundrymen, had taken a pump from the mine and repaired it at their shop, replaced it, and filed a lien. It was held that they came within the Statute, and had a lien paramount to mortgages on the mine at the time they did the work.

Warren v. *Sohn* et al., 112 Ind. p. 216.

It can not be thought that these foundrymen did all the work with their own hands any more than Vane. They were "employed" about the mine, making repairs at their shop, while Vane was "employed" in making the additions on the line itself.

It would seem this should close the discussion.

It should be said that case was not decided at the time of the trial of this cause.

There is yet another Statute which protects Vane's lien if the Employe's Act should fail. In 1883 the Mechanic's Lien Law was revised and re-enacted. (Acts 1883.)

See also Elliott's Sup. 1889, Secs. 1688 and 1690. The material sections are as follows.

"SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That mechanics, and *all persons performing labor* or furnishing material or machinery for erecting, altering, repairing or removing any house, mill, manufactory or other building, bridge, reservoir, system of water-works or *other structure*, may have a lien, separately or jointly, upon the house, mill, manufactory or other building, bridge, reservoir, system of water-works or other structure, which they may have erected, altered, repaired or removed, or for which they may have furnished material or machinery of any description, and on the interest of the owner of the lot or land on which it stands, or *with which it is connected*, to the extent of the value of any labor done or materials or machinery furnished, or both."

"SEC. 3. Any person wishing to acquire such lien upon any property, whether his claim be due or not, shall file in the Recorder's office of the county, at any time within sixty days after the performing of such labor or furnishing such materials or machinery, notice of his intention to hold a lien upon such property for the amount of his claim, specifically setting

forth therein the amount claimed, and giving a substantial description of such lot or land on which the house, mill, manufactory or other building, bridge, reservoir, system of water-works or other structure may stand or be connected with, or to which it may be removed. *Any description of the lot or land in a notice of lien will be sufficient, if, from such description or any reference therein, the lot or land can be identified.*''

Now, while the notices filed in the several counties were framed to comply with the employe's Act, (Exhibits Tr., p. 499 *et seq.*) yet they substantially comply with the requirements of the Statute of 1883.

In Jones on Liens it is said:

''SEC. 1421. In general, it is only necessary that the statement or notice of lien should so describe the property that it can be reasonably recognized. In other words, a description is sufficient if it contains enough to enable a person who is familiar with the locality to identify the land intended to be described with reasonable certainty. There is generally great reluctance to declaring a claim invalid merely by reason of a loose description; and the jury is generally allowed to determine whether the land is in fact described. Only such descriptions as are calculated to mislead subsequent purchasers and creditors, or fail to locate the premises, invalidate the claim.

''The land may be described by the buildings or structures covering the land, if it is sought to subject only the land so covered to the lien, and the buildings are such in character, or are so described as to be readily identified.

''A mine which is well known may be described by name, the county, township and mining district being also mentioned. A quartz mill may be described by the name by which it is known in a town and county named.''

II. COMMON LAW LIEN.

At the time the receivers were appointed Vane had possession of the wires. They were not entirely strung. The work was not completed till Nov. 12, 1884.

The Master says:

''Mr. Vane kept possession of the (six) wires by refusing to allow connections to be made, and turned the ends of the wires down into the ground. He retained such possession until Nov. 20, 1884, when he delivered possession to the receivers,'' under the contract set out on Page 4.

The Master held that Vane having a lien under the Statutes, had none other, and Judge Woods decided that he had no lien either by the Statute, or "at common law or in equity."

If it be true that he had no lien under the Statutes, then we proceed to inquire whether he did not have such a claim on the wires as a Court will protect.

It is fair to say that Judge Woods thought, although it is not expressed in his brief opinion, that the existing line on which Vane strung the six wires, was "real estate," and so the principle, that an artisan may hold possession till he is paid, did not apply. The principle of the common law is applied to its full limit in Indiana; first, by Statute (R. S. 1881, Sec. 5304), and second, by the cases—

Holderman v. *Manier*, 104 Ind. 118 and cases cited;
Darter v. *Brown*, 48 Ind. 395;
East v. *Ferguson*, 59 Ind. 164;
Hanna v. *Phelps*, 7 Ind. 21.

That Vane had help does not destroy the lien.

Shaw v. *Bradley*, 59 Mich., p. 204. (Contractor.)
Hall v. *Boom Co.*, 51 Mich., 377; 1 Jones on Liens, Sec. 738.

The Master's Report puts at rest any question about Vane's possession. He effectually prevented every one from deriving any benefit from the use of the wires until he yielded possession on November 20. And under the stipulation of the previous day, he did not lose his lien by yielding possession.

McFarland v. *Wheeler*, 26 Wend. 467.

It is not stated directly what title the New York Company had to the line across Indiana. It clearly appears from the original bill filed by the Indiana Company, that it had made some arrangement whereby the New York Company had "partially constructed the lines * * * and operates and manages the same." (Tr. p. 1. folio 3.) The answer of the New York Company admits this to be true. (Tr. p. 4, folio 10.) This would seem to imply a lease or license only. And as the law of incorporation provides that telegraph companies "may continue for a term not exceeding fifty years" (R. S. 1881, Sec. 4166), it would seem to follow, that it could not execute a lease for any longer period. Such leaseholds are personal property in this State.

McCarty v. *Burnett*, 84 Ind. 26;
McDowell v. *Hendrix*, 67 Ind. 513;
Schee v. *Wisemen*, 79 Ind. 389;
Smith v. *Dodd*, 35 Ind. 452–6;
Morris v. *Rathbone*, 21 Ind. 466–7;
Cade v. *Brownlee*, 15 Ind. 369;
Duchane v. *Goodtitle*, 1 Blackf. 117.

It is necessary to uphold the adverse contention that the Indiana company had acquired a fee in which the poles were set by the New York company. The record sustains no such assumption. It may as well have been merely a license or lease. Whatever the estate of the Indiana Company, it is clear that the New York Company was not the absolute owner in fee. For in the bill the Indiana Company says the New York Company "has partially constructed the lines of your orator, and operates and manages the same." So that it is evident the right of use held by the New York Company was not "real estate," and when Vane took and strung the wires they did not become "land," so that the interest of the New York Company was necessarily personal property. Indeed, the estate, or "right of way" of the Indiana Company would seem to partake of that character.

Turner v. *I., B. & W. Ry. Co.*, 8 Bis. p. 389.

But the matter is settled.

In *Boston Safe Deposit and Trust Co.* v. *Bankers' and Merchants' Tel. Co.*, involving this property, (36 Fed. Rep. 288) Judge Wallace held, that these very wires styled "strung wires" did not become "realty," but remained "personalty" (p. 297.) The opinion states the history of this telegraph line, including that part constructed by Vane from Freeport to Hammond. (Page 292–3.)

See *Telegraph Co.* v. *Railroad Co.*, 11 Fed. Rep. 6.

The six wires strung by Vane being personal property, and forming no part of the line in operation, and being yet in his possession, under the strict rules of common law, he was entitled to hold them until paid for the labor he had expended in putting them into position to be used. As the six wires were distinct from the four

in use, it is perhaps the same as if the four were not on the poles at all. As the New York Company at most, did not own the "estate" in which the poles were set, the case stands as if A. gives B. permission to erect and use a house on his lot for commercial purposes. In such case if B. should furnish the material and employ V. to erect the house, it is believed he would have the right to hold possession til. paid.

It is immaterial whether the work is done by the claimant, or others he employs for that purpose.

"It is as competent for the company to employ an agent to do the whole labor for a specified sum as to do it through laborers employed by the day or month. An artisan has a lien for work done in the way of his trade by another than himself outside his shop." (1 Jones on Liens, Section 738.)

And as a tailor employed to make a whole suit of clothes has a lien on any part of the suit for the whole price, (*Blake* v. *Nicholson*, 3 M. & S. 167), so Vane had a right to hold the ends of the wires for his entire claim.

Holderman v. *Manier*, 104 *Ind.* 118;
1 Jones on Liens, Sec. 739.

The question in this case is as new, and not less interesting, than that in *Scarfe* v. *Morgan*, 4 M. & W. 270. And this, like that, must be determined by the application of the general principles of equity to peculiar facts. These principles "keep pace with the progress of the country and adapt themselves to the new developments of time and circumstance."

Lord Mansfield said "the convenience of commerce and natural justice are on the side of liens."

Green v. *Farmer*, 4 Burr. 2214.

Best, J., remarked: "As between debtor and creditor the doctrine of liens is so equitable that it can not be favored too much."

Jacobs v. *Latour*, 5 Bing. 130.

"This right," says Kent, "rests on principles of natural equity

and commercial necessity, and it prevents circuity of action, and gives security and confidence to agents." (2 Kent's Comm. 634.)

Arians v. *Binkley*, 65 Wis. 26;
Hall v. *Boom Co.*, 51 Mich. 377;
Webber v. *Cogswell*, 2 Canada, S. C. 15;
Williams v. *Allsop*, 10 C. B. (N. S.) 417;
Hammond v. *Danielson*, 126 Mass. 294;
Townsend v. *Newell*, 14 Pick. 332.

III. Equitable Lien.

The Roman law, and the laws of nations drawing their jurisprudence from that source awards such liens graciously. And the harsher rules of the English law are being liberalized until now Courts and legislatures lend a willing hand to assist the laborer to obtain the price of his hire.

This wholesome equity has been adopted in the operation of railways in this country.

Fosdick v. *Scholl*, 99 U. S., 235;
Miltenberger v. *Ry. Co.* 106 U. S., 286;
Barton v. *Barbour*, 104 U. S., 122;
Hale v. *Frost*, 99 U. S., 389;
Gilbert v. *R. R.*, 33 Grat., 586;
Turner v. *I., B. & W. Ry. Co.*, 8 Bis. 315;
Douglass v. *Cline*, 3 Hughes C. C., 320;
Union Trust Co. v. *Walker*, 107 U. S., 596;
Farmers L. & T. Co. v. *Railroad*, 33 Fed. Rep., 778;
Trust Co. v. *Souther*, 107 U. S., 591;
Burnham v. *Bowen*, 111 U. S., 776;
Trust Co v. *Railway Co.*, 117 U. S., 434;
Blair v. *Railroad Co.*, 22 Fed. Rep., 471.

It is equally applicable to a telegraph line.

Vane's equities are strong. His employer was a foreign corporation to Indiana, engaged in the construction of a telegraph system throughout the country. The press of public business required additional facilities, as the four wires were insufficient. (Tr. p. 40, *et*

seq.) Vane had built this line, as Superintendent of construction. In two weeks after it was completed, the company telegraphed him to come to Chicago at once. There he was employed. "Our folks," the Superintendent said, "want to get the (six) wires through as quick as possible;" and when Vane said he would put two gangs of men at work, the Superintendent said that two could not get it through fast enough, and Vane agreed to put on four. (Tr. pp. 42–4.) The work was not quite completed when Vane heard of the insolvent proceedings in the New York courts. (T. pp. 44–5.) He then "grounded the wires," and refused to let any one use them, because to do so "would be giving up my possession of them." (Tr. p. 46, folio 111.)

The receivers employed Vane to string wires from Chicago to Hammond, to connect with these wires. Just at the receivership, Vane had filed liens in the counties through which the lines passed. Early in October, the receivers sent Mr. Stewart, their Superintendent, to Vane, and who stated the amount of his claims, which were approved. (Tr. p. 54.) The accounts are filed with his petition. A mere glance will show that Vane bought tools, anchor guys, poles, insulators, etc., etc, and other materials necessary; advanced money to pay charges on material in order to "rush the work along," and held his men subject to the commands of the company, and continued to push the work, although the company did not pay him at the times agreed upon. His labor added largely to the capacity and value of the property. Aside from the statutory or common law protection, these facts seem to bring his claims within the letter and spirit of the modern rule. It is true no order was made at the time of the appointment of the receivers, as is usual in railway receiverships. Is a worthy claimant to lose his pay if the Court omits the usual order? Vane could not compel the Court to make a general order, but when he brings himself within the rule we insist he is entitled to have a judgment securing his claim as fully as if such general order had been first made. It is sometimes said this is matter of discretion; but it is judicial discretion. And the principle is so well established that it has now become law. Business is done on the faith of its existence and fulfillment; and a failure to make the order in the first instance, is no bar to subsequent allowance.

Blair v. *St. L., H. & K. R. R. Co.*, 22 Fed. Rep. 471.

In this case Judge Brewer said:

"In all cases the payment of such claims rests on the fact that it is equitable they should be paid, and oftentimes this equity can only be determined upon a full investigation of their nature—an investigation which can not be had at the time the receiver is appointed."

This Court said in Miltenberger's case that many circumstances may exist making it necessary to pay pre-existing debts of certain classes out of the earnings of the receivership, or even the *corpus* of the property. This we submit is such a case.

IV. Lastly.

And lastly, we insist that the arrangement of November 19, 1884, fixed a lien on the property. Vane's accounts had been stated; his mechanic's liens had been filed, and of course known to Doolittle and the receivers. It was known to everyone connected with the management of the line that Vane was holding possession of the six wires for his pay. Vane told Doolittle so, and the agreement made by the receivers recites it.

The receivers wanted the use of the wires. They had no money. This is shown by the insolvency of the Company, and the acts of the receivers soon after in inducing the Courts to issue receiver's certificates. This agreement was written by Doolittle, the Chicago counsel for the receivers. It was made to induce Vane to yield up possession. They knew he believed it recognized his claim on the wires. It was made in the presence of that assertion. The words are: "*It is expressly understood that such use of said wires shall not be construed in any way or to any extent as impairing or interjering with the lien of said Vane thereon.*" Vane was induced to alter his position by this contract. It is too late, it is believed, in a court of conscience, or elsewhere, to interpolate into the contract words so as to make it read: "By surrendering possession, Vane's lien shall not be destroyed, *if he has any.*"

Norris v. *Williams*, 1 C. & M (Ex.) 842, is not so strong as the case at bar. One Williams kept a shipyard. Wright, the owner of an old vessel, put her in the yard to be repaired. Williams and others furnished timber and other materials which were used in repairing the ship, but they did no labor. Under these circumstan-

ces it was conceded the material-men had no lien. Wright advertised the vessel for sale. And Williams and others being loud in their demands for pay, before the sale Wright said they should be paid out of the purchase-money, and gave a writing to that effect. Norris then bought the ship, to whom Wright made a bill of sale, and Williams refused to allow her to be taken from the yard till the material bills were paid. Norris began an action at law to recover the vessel, having knowledge of the arrangement, and not having paid any one. It was held by the arrangement the material-men had acquired a lien on the vessel, and Williams had a right to hold pos-ession till the claims were paid. It is well settled that a charge may be a lien on property by contract, express or implied, which courts of equity will enforce if the claimant has no other remedy. Some call it a lien; others a right equivalent to a lien. Some repose the rule on the law of trusts; others on an implied contract. But by whatever name, and under whatever rule, in effect equity courts are agreed that if one adds to the value of another's property, and has no adequate remedy at law, and the owner recognizes the equity as a specific charge, it will be enforced from considerations of right and justice.

2 Sto. Eq., Sec. 1237;
3 Pom. Eq. Jur. Ch. 7, Sec. 1233, *et seq.*;
Perry v. *Board*, 102 N. Y. 99;
Payne v. *Wilson*, 74 N. Y. 348;
Unity, etc., Asso. v. *King*, 25 Beav. 72;
Clark v. *Southwick*, 1 Curtis, 297;
Gregory v. *Morris*, 96 U. S., 619;
Pinch v. *Anthony*, 8 Allen, 536.
Pavy's Case, 1 Ch. Div. 631.

It is elemetary that one can not take the benefits and disclaim the burdens of any contract or arrangement. To use Lord Kenyon's homely words, "you can not blow hot and cold."

"A party * * * recognizing a claim or lien of another, is estopped from subsequently disputing its validity."

2 Her. Est. Sec. 1069.

Appellant asks that the case be reversed with proper instructions.

Respectfully submitted,

ADDISON C. HARRIS,

Solicitor for JAMES E. VANE,

Appellant.

Indianapolis, August 24, 1889.

OCT 28 1869

SUPREME COURT OF THE UNITED STATES.

JAMES E. VANE,
Appellant,

vs.

RICHARD S. NEWCOMBE and JAMES G. SMITH, RECEIVERS,
Appellees.

No. 334.

IN THE MATTER OF THE INTERVENING PETITION OF JAMES E. VANE.

BRIEF FOR APPELLEES.

ROBERT G. INGERSOLL,
Of Counsel for Receivers, Appellees.

C. G. Burgoyne's Printing Business, 146 Centre Street, N. Y.

Supreme Court of the United States.

JAMES E. VANE,
Appellant,

AGAINST

RICHARD S. NEWCOMBE and JAMES G. SMITH, Receivers,
Appellees.

IN THE MATTER

OF

The Intervening Petition of JAMES E. VANE.

STATEMENT.

VANE'S CONTRACT.

In the year 1883, the appellant James E. Vane was *employed*, and for several years prior thereto had been employed, as Superintendent of Construction of the Bankers' and Merchants' Construction Company of Indiana (fol. 96). On or about the 17th of June, 1884, Vane *entered into a contract* with the Bankers' and Merchants' Telegraph Company to string six lines of wire at $45 per mile, or $7.50 per mile per wire from Freeport, O., to Hammond, Indiana, the company to fur-

nish material, Vane to supply the labor and regulate the same (fols. 100–103).

Vane entered on this work, and *under the contract*, which was partly oral and partly written (fol. 102), strung all but two wires, those between Lake Station and Hammond (fol. 107).

In the course of the construction the said contract was modified or altered so that Vane was to supply material and advance for other necessaries, the same to be paid for by the company upon the certification of his (Vane's) bill therefor (fol. 109).

Vane Files His Lien.

On or about the 1st day of July, 1884, the Bankers' and Merchants' Telegraph Company failed.

On or about the 15th day of September, 1884, Vane filed liens for the work he had done and the materials he had supplied under the "*Employees Act*" (Sec. 5286 R. S., Ind.), and gave the notice as therein required to the Bankers' and Merchants' Telegraph Company (fols. 117, etc.).

Receivers are Appointed.

Receivers Newcombe and Smith, who had been appointed in the action of Day vs. The Bankers' and Merchants' Telegraph Company, in New York on the 23d of September, 1884, qualified and took possession of all the property of the Telegraph Company in Indiana on October 14th, 1884 (fol. 12).

The Special Receiver's Certificates are Issued.

On the 3d of November, 1884, in the action of Day vs. The Bankers' and Merchants' Telegraph Co., by

order of the Supreme Court of New York, Receivers' certificates to the amount of $150,000 were issued to preserve the property of the said Bankers' and Merchants' Telegraph Company, which said certificates were made a lien "on all the lines of telegraph at and "between Freeport, in Ohio, and Hammond, in Indi-"ana, and at and between Pittsburg, in Pennsylvania, "and Indianapolis, in Indiana, with a branch to Cincin-"nati, in Ohio, and to cover all the intermediate points, "and to be prior as a redemption debt to every other "lien, claim or encumbrance thereon" (fol. 168).

THE STIPULATION OF THE RECEIVERS.

On the 19th of November, 1884, the Receivers having learned that Vane held the wires he had strung, under a claim of a lien thereon, entered into the following stipulation and agreement with him (fol. 22):

"CHICAGO, Illinois, Nov. 19, 1884.

"It is hereby stipulated and understood that the "telegraph wires on the poles of the Bankers' and "Merchants' Telegraph Company in the State of In-"diana, which were strung by James E. Vane, and "upon which he claims a lien, shall be connected with "the wires of the said company from Hammond, In-"diana, to Chicago, Illinois, now constructed and to be "constructed, and shall be used for telegraph business "by the Receivers of the said company; but it is also "expressly understood that such use of said wires shall "not be construed in any way or to any extent as im-"pairing or interfering with the lien of the said Vane "thereon.

"(Sg.) RICHARD S. NEWCOMBE,
"JAMES G. SMITH,
Receivers."

Vane enters the Employ of the Receivers.

Shortly after, or at about the time of the signing of this stipulation by the Receivers, Vane contracted with the Receivers to complete certain lines of telegraph (fols. 130, &c.).

The General Receiver' Certificates are Issued.

On the sixth day of January, 1885, the Supreme Court of New York in the action of De Haven vs. The Bankers' and Merchants' Telegraph Company authorized the issue of additional Receivers' certificates (fol. 178).

This issue was legalized to the amount of $470,052.06 on the 6th of May, 1885, by the Circuit Cout of the U. S. for the District of Indiana, in the following language (fol. 56):

"—the Receivers' certificates * * * amounting "altogether to the sum of four hundred and seventy "thousand and fifty-two dollars and six cents be, and "the same are hereby declared to be, a lien and charge "upon all and singular the lines, property, assets and "effects, real, personal and mixed, of the Bankers' and "Merchants' Telegraph Company within this State "paramount to the lien of the mortgage of ten million "dollars ($10,000,000) heretofore executed by the "Bankers' and Merchants' Telegraph Company to the "Farmers' Loan and Trust Co. as trustee, and to all "other liens and charges, except that they shall be "subsequent to the lien of the certificates heretofore "issued herein, amounting to $130,000."

Disposition of the Certificates.

This last-named amount had, by order of the Court been utilized to pay the indebtedness of the company to the Construction Company, and to complete the lines

between Pittsburg and Indianapolis (fols. 169, 140). The issue of $470, 052.06 likewise fell into the hands of innocent purchasers for value (fols. 148–157).

Vane files his intervening Petition.

On the 7th day of March, 1885, Vane filed his intervening petition in the U. S. Circuit Court, for the district of Indiana, praying that he might be permitted to enforce the statutory lien, or to retake possession of the wires surrended November 19, 1884; or that he be allowed a lien on the wires for the payment of the sums due him or so much thereof as to the Court might seem just (fols. 24–30).

Answer of the Receivers.

The Court allowed the appellant herein to intervene, and on May 2d, 1885, the Receivers filed their answer (fols. 49–52), setting up (1) a general denial, (2) averring payment (3) that Vane never was an employee of the company, (4) alleging the prior and first lieu of the Receivers' Certificates, issued Nov. 3, 1884, (5) and also of the prior lien of a ten millon dollar mortgage theretofore made upon the property of the company.

To this answer Vane filed a general replication (fol. 53).

Case Referred to Master.

On May 16, 1885, the matter of Vane's petition was referred to W. P. Fishback, Master (fol. 56½).

Master's Report.

The said Master filed his report January 30th, 1886 (fols. 57–63), which, in brief, decided that Vane was an

employee of the Telegraph Company within the meaning of Sec. 5286, Revised Statutes of Indiana, and gave him a lien for $13,771.12 over the lien of the Receiver's certificates issued November 3, 1884. He also found the sum of $1,898.50 to be due Vane from the Receivers, but that this sum should be postponed as to the issue of $150,000 of certificates and preferred as to those which were subsequently issued.

RECEIVER'S EXCEPTIONS TO MASTER'S REPORTS.

To this report the Receivers filed the following exceptions: "*First Exception.* For that said Master has "certified that said Vane the intervenor was an employee "of the said company within the meaning of Section "5286 of the Revised Statutes of Indiana (see Acts "1881), and by virtue of the notice so filed by him as "required by Section 5287 of the Revised Statutes of "Indiana aforesaid, has acquired a lien upon the "property of the company in the counties through "which the telegraph was built, whereas said Master "ought to have found and reported to this Court that "said Vane did not acquire any lien whatever by virtue "of any notice given by him upon the property of said "company in any county or counties through which "said lines were constructed in the State of Indiana, "or elsewhere under the laws of Indiana.

"Second exception. For that said Master has found "and reported to this Court that said Vane, intervenor, "in doing the work and services claimed by him to "have been rendered and performed as set forth in his "petition was an employee of said company within the "meaning of Section 5286 of the Revised Statutes of "Indiana (Acts 1881), and that said intervenor filed his "notice as required by Section 5287 of the Revised "Statutes of Indiana in the counties through which "said telegraph lines were constructed, and that said "liens cover the following items:

" For stringing wires, &c., $45 per mile....	$11,160 00
" For putting cross arms, &c., from Lake " Station to Hammond.....	600 00
" For stringing two wires from Hammond " junction, &c.....	560 00
" For extra work and delay.....	1,951 12
	14,271 12
" Less credits	500 00
" Total.....	$13,771 12

" Whereas said Master ought to have found and " reported to this Court that said Vane was not an " employee of the said company within the meaning of " Section 5286, Revised Statutes of Indiana, and that " said Vane had no lien and did not acquire any " whatever by any notice or otherwise within the " meaning of said Sections 5286 or 5287 of said " statutes for said items or either of them.

" And that said Vane was a contractor in his agree- " ment with the company and not an employee of the " same ; and that said item of $600 for putting in cross " arms, &c., was not included in nor covered by his " pretented notice of lien, &c., nor by the agree- " ment or contract under which the labor was per- " formed, and that for such services said Vane has no " lien whatever.

" And that said item of $1,951.12 for extra work, " delay, &c., was not covered by or included in said " pretended notice of lien nor by the terms of said con- " tract with said company, and that said Vane has no " lien therefor " (fols. 64–67).

Vanes' Exceptions.

Vane filed his exceptions to the Master's report on the 11th of February, 1886, claiming that the Master

should have found the entire sum due him, *i. e.*, $15,069.62 to be a lien paramount to the Receiver's certificates (fols. 67–70).

The Decree.

On the 24th of April, 1886, Hon. William A. Woods filed his rulings on the exceptions taken to the Master's report, and upon said rulings on the 6th of May, 1886, the following decree was made:

" * * * It is, therefore, ordered adjudged and " decreed by the Court that James E. Vane, petitioner, " has a just claim against the Bankers' and Merchants' " Telegraph Company of New York for the amount " found to be due him from said company by the " Master, being the sum of $15,069.62 dollars and that " he has a just claim against said Receivers for work " done for them as found by said Master amounting to " the sum of $1,898.33 dollars.

" And it is ordered, adjudged and decreed by the " Court that said petitioner James E. Vane has no lien " upon the property of said Telegraph Company defend- " ant for the amount so found to be due him or any " part thereof, and that said sum of $15,069.62 is a " general floating debt of said contracting corporation " not entitled to any priority in preference, and that " said sum of $1,898,33 dollars is a valid debt of the " said Receivers payable out of any funds in their hands " as such available for the payment of the debts of said " trust" (fols 70 and 71).

Vane's Appeal.

Vane was also by this decree allowed an appeal to this Court from so much of this decree as disallowed his claim for a lien for said sum of $15,069.62 dollars and from the overruling of his exceptions to the Master's

report and sustaining of the exceptions of the Receivers thereto (fol. 71).

Judge Wood's opinion will be found in 27 Fed. Rep., 536.

ARGUMENT.

The appellant seeks to establish his claim for a lien on three distinct theories.

1. Under the Indiana Employees Act. Failing in that—

2. Under the Common Law Lien ; while

3. He also claims a lien by estoppel born of the stipulation entered into by the Receivers and bearing date the 19th of November, 1884.

The Employee's Act.

The statute under which Vane filed his lien and issued his notices is found in 5286 Revised Statutes Indiana, and more in full in the Laws of 1877, Act of March 13th. To avail himself of this act Vane, of course, must have been an employee of the Bankers' and Merchants' Telegraph Company within the meaning of that act.

We must then inquire what this statute means—to whom does it offer protection—why was it passed.

And these are pertinent inquiries in construing acts of Legislature.

> Aldridge vs. Williams, 3 Howard (U. S.), 9.
> Chase vs. Lord, 77 N. Y., 1.

There seems to be no question but that Vane was a contractor. He had never held any other position with the Telegraph Company prior to his being given "the stringing work" on the new line (see printed case, fols.

95, etc.), and all through his examination Vane was asked and answered questions in regard to "the contract" (fol. 102).

This being so, our inquiry narrows down to the question as to whether contractors were included in and were intended to be embraced by the word "employee" in the Act of 1877.

We can gain a little information from the statute itself, so that it would seem proper to begin with the words used.

The law is as follows: "An act giving the *employees* "of corporations a lien for their *work* and *labor* upon "the corporate property of such corporations and the "earnings thereof, together with the mode of en- "forcing the same and repealing all laws in conflict "therewith."

(Approved March 13th, 1877).

"SECTION 1. Be it enacted by the General Assembly of "the State of Indiana, That the *employees* of any cor- "poration doing business in this State whether organ- "ized under the laws of this State or otherwise shall be "and they are hereby entitled to have and to hold a "first and prior lien upon the corporate property of "such corporation, and the earnings thereof, for all "*work* and *labor done* and performed by such *employees* "for such corporation from the date of their *employ-* "*ment* by said corporation; which lien shall lie prior "to any and all liens created or acquired subsequent to "the date of such *employment* by such corporation, ex- "cept as in this act provided."

The rest of this act pertains to the method of inforcing the lien and is unimportant for the purposes of this discussion.

This act is known as "The Employee's Act." No qualifying or explanatory words are used.

"The title of an act may be examined to discover the "legislative design."

People vs. Wood, 71 N. Y., 371.

The lien is given for "work and labor." These are the only words used in this connection. *The text must be adhered to.* There is not a word about "employees furnishing materials." Not a syllable about "employee's making advances." Employees who do these things were evidently not in the mind of the Legislature.

"The legislative intent in statutes must be gathered "*from the language used in the law as passed*; compar- "ing it when any ambiguity exists with other laws on "the same subject."

Matter of Rochester Water Commissioners, 66 N. Y., 413.
Hudson Iron Co. vs. Alger, 54 N. Y., 173.

"An Act authorizing property to be incumbered, "without or against the consent of the owner, and "without resort to legal process or judicial action, is "an innovation upon the Common Law *and will not be* "*extended* in its operation *beyond a fair and reasonable* "*import of the words used.*"

Mushlitt vs. Silvermann, 50 N. Y., 360.

In the Indiana Miners' Law (R. S., 5471) the act gave a lien to "Miners and other persons employed "and working in and about the mines." In the Mechanics Lien Law of Indiana the statute provides "That mechanics and all persons performing labor or "furnishing material for machinery for erecting, alter- "ing, repairing or removing any house, mill, manufac- "tory, or other building, bridge, reservoir, system of "waterworks or other structure may have a lien."

These acts were intended for the protection of several different classes of persons minutely described by the language of the Statutes. Yet the appellants claim that here is a law passed which differs from the form and custom of other statutes of the same kind, which designate but one class of persons, but which was in-

tended to embrace all sorts and conditions of men—laborers, although there was an act protecting them (R. S., 5206), and material men, although they are expressly provided for in the Mechanics' Act from which we have just quoted.

If the Employees Act embraced these persons and many others already provided for by statutes expressly including them, why are these laws still in force? Is it not more reasonable to suppose that the State which made provision for its laborers, miners, mechanics, contractors or material men may have recognized that notwithstanding these provisions there were still left a large class of persons unprotected, persons who were neither laborers nor contractors, nor furnishers of material?

For instance a clerk, a book-keeper, a stenographer or the like would come under none of these heads. This being so, a law was passed to include this class as yet unprovided for, and "employee" was the term used to include all those persons who, as we have before said, were neither contractors, laborers, servants, material men, nor mechanics.

JUDGE WOODS was also of this opinion, as in his decision, in this case he said;

"To be entitled to the benefits of this statute and "others of a like character since enacted, I think it "clear that the employee must have been a servant "bound in some degree, at least to the duties of a "servant and not like the petitioner, a mere contractor "bound only to produce or cause to be produced a "certain result, a result of labor to be sure, but free to "dispose of his own time and personal effort according "to his pleasure, without responsibility to the other "party."

The only words, as we have before said, which are used in the statute in question, qualifying at all the expression "employee" are the words "work and labor."

In speaking of the meaning of the words "labor" or "laborer," the Court of Appeals, in New York said;

"The term 'laborer' cannot be construed as designating one who contracts for and furnishes the labor and service of others, or one who contracts for and furnishes one or more teams for work * * * when once an enlarged meaning is given to the words 'laborer' and 'labor' as used in the statute * * * there will be little difficulty in the effort to give a liberal effect to the statute to bring within its terms all who in any way contribute to the construction of a road by furnishing the labor of others."

Balch vs. N. Y. & O. M. R. R. Co., 46 N. Y., 524.

"A contractor for a construction of part of a railroad is not a laborer or servant within the provisions of the General Railroad Act making stockholders personally liable for the debts of the corporation."

Aiken vs. Wasson, 24 N. Y., 482.

The appellant cites a number of cases showing or purporting to show that the word "employee" has been held to include lawyers, architects and many other persons. But the fact is the point in question here has never yet been passed upon and the cases cited by the appellant therefore cannot be in point.

As an example of this let us take the case of Gurney vs. The Atlantic and G. W. Railway, 58 N. Y., 358, upon which is laid such stress. In the first place it is modified and restricted by a later case of Wakefield vs. Fargo, 90 N. Y., 214, and moreover the word employee in that case was used in an *order* (not in a statute), drawn by counsel who testified at the trial that it was intended to embrace all persons not laborers and even with this evidence before them two judges dissented from construing the word so as to include a lawyer.

The Mechanic's Lien Law.

But the appellant feeling the uncertainty of his ground here shifts off to the Mechanic's lien law, claiming a lien under that act having "substantially complied with the requirements of this statute."

This of course will not do. A party failing to properly perfect a lien under one act cannot patch up his errors or get rid of his misfit by showing that he has "substantially complied with the requirements" of another act by mistake.

"Persons asserting a lien must furnish strict proof of *all* that is essential to the creation of the lien."

Davis vs. Alvord, 94 U. S., 545.

"The defects in the claim as filed cannot be cured "by allegations in the complaint, in an action to pro-"tect the alleged lien against a third party."

Cook vs. Cook, 7 S. E., 709.

"Under a lien created by statute, the lienor's rights "are to be ascertained *by the statute* rather than by any "other resulting equities incident to the case."

Railroad Co. vs. Drew, 3 Woods (U. S.), 691.

The Receiver's Certificates and Vane's Alleged Liens.

On the 3d of November, 1884, the Supreme Court of New York in the action of Day vs. The Bankers' and Merchants' Telegraph Company authorized the issue of $150,000 of Receiver's certificates.

This issue was ratified by the Circuit Court of the United States for the District of Indiana December 15, 1884.

These certificates came to be known as the "Special Receiver's Certificates" (see fols. 145 and 146). The

status of these certificates was described on their face, as follows :

" Said certificates are hereby declared to be a debt " of the Receivers, incurred for the benefit and pro- " tection of the property in their hands, and until full " payment thereof, *to be a first lien and charge* upon all " the telegraph lines and properties which are located " between Freeport, O., and Hammond, Ind., and be- " tween Richmond, Ind., Eaton, O., and Cincinnati, O., " according to a certain deed of trust or mortgage given " to secure this issue of certificates covering said lines " and properties executed by said Receivers to the " Farmers' Loan and Trust Company, as trustees, dated " Nov. 7, 1884 " (fol. 164).

The order of Judge ANDREWS, upon which these certificates were issued, was worded as follows :

" * * * the issue of said certificates to be secured " by a trust deed in the nature of a first lien for " $150,000 on all of the lines of telegraph * * * " *and to be prior as a redemption debt to every other lien,* " *claim or encumbrance thereon*" (fol. 168).

On the 6th day of January, 1885, the Supreme Court of New York in the action of De Haven vs. The B. & M. Tel. Co., authorized an issue of additional Receiver's certificates. These to the amount of $470,052.06 were ratified by the Circuit Court of the United States for the District of Indiana on May 6, 1885, and came to be known as the " General Certificates."

The order authorizing these certificates declared them to be *a first lien and charge on all the property of the company, real, personal and mixed* within the State of Indiana, paramount to the lien of the million dollar mortgage already on this property " and to all other " liens and charges except that they shall be subse- " quent to the lien of the certificates heretofore issued " herein amounting to $130,000 " (fol. 56).

These General Certificates were issued in payment of various debts and judgments (fols. 149–162) in accord-

ance with the judgment in the De Haven action (fols. 184-5) and are still outstanding.

It will be remembered that Vane's intervening petition was filed on March 7, 1885, that is, after the two issues of Receiver's certificates were in the hands of innocent purchasers for value.

RECEIVER'S CERTIFICATES, BONDHOLDERS AND OTHER CREDITORS.

"Such certificates (Receiver's) are not debts of the "company but of the Receiver's, backed by the pledged "faith of the Court that the property on which they "are made a charge is in the possession of "the Court, and that it will provide for the payment "of such certificates before the property or the pro-"ceeds of it shall pass out of its control."

Jones on Railroad Securities, 537.
Hoover vs. M. & G. Lake Ry. Co., 29 N. J. Eq., 4.

"A Receiver's certificate is a debt not of the com-"pany. * * * The faith of the Court is pledged to "its payment."

Beach on Receivers, 396.
Meyer vs. Johnson, 53 Ala., 349.

The power of a court of equity in the exercise of its extraordinary jurisdiction to issue Receiver's certificates and make them a first lien upon the property is not now questioned.

Wallace vs. Loomis, 97 U. S., 146.
Jones on R'way Securities, Ch. XVII.
Beach on Receivers, Sec. 379, &c., and cases cited.

The validity of these Receiver's certificates has never been questioned during all the litigations of the Bankers' and Merchants' Telegraph Co. (at all events that is

certainly not a question in this case (see transcript of record)), but whenever they have appeared in said litigations they have been openly or tacitly acknowledged *as paramount liens superior in grade to the claims of bondholders.*

Now let us see how and where *bondholders* stand in regard to such creditors as Vane.

In the case of Dennison vs. Chicago, Alton and St. Louis R. R. Co., 4 Bissell, 414, where certain parties had furnished materials to the railroad company after the execution of a mortgage, their claims were held postponed until the bonds were paid, and the fact that they were promised payment by the Receiver *did not change the case.* Judge DRUMMOND in making this decision said :

" It is precisely like the case of a man who furnishes " to the owner of a farm the means of carrying it on, " but there is another party who has a lien upon that " farm, and it is sold in order that the party who has " the prior lien may be paid.

" Now, the fact that the mechanic or laborer has " furnished the means of carrying on the farm would " not authorize him to come into a court of equity and " cut off the prior lien which exists on the farm and " prevent it from being paid. Those parties ought to be " paid. They have a just claim against this road. " But it is against an insolvent corporation and they " ask parties who have a prior right and lien to pay " them, because others with whom they have dealt can- " not do so."

In the case of Galveston R. R. Co. vs. Cowdery, 11 Wallace,482, in regard to the rights of material men and laborers Judge BRADLEY held that their claims are subject to the claims of bondholders.

In the great case of Fosdict vs. Schall, 99 U. S., 235, the rights of bondholders are thoroughly gone into and the result arrived at is that general creditors have no rights in or liens upon the corporate property of an

insolvent company prior to the rights of the bondholders, but that under certain peculiar circumstances the creditors have a lien *on the income.*

In 1881 the U. S. Circuit Court of Virginia considered the rights of *contractors* and laborers for labor performed in the construction of a railroad after the execution of a mortgage on the road, and held that such claims would not be allowed except as junior in lien to the mortgage debt, AND THIS IRRESPECTIVE OF THE QUESTION WHETHER OR NOT MECHANICS' LIENS HAD BEEN FILED.

Tommey vs. Spartenburg and Asheville R. R. Co., 4 Hughes, 640.

Again, in 1886, the Court of Appeals in New York said :

" We are unable to discover any principle upon " which the claims of the employees for labor per- " formed before the appointment of the Receiver can " be so extended as to diminish or impair or postpone " the lien of the mortgage. * * *

" The argument in its support is that the value of " the mortgage lien has been enhanced by the labor of " the workman. It is easy to see that under this plea " the lienors might be entirely defeated and the fore- " closure of his mortgage rendered inoperative and use- " less."

Met. Trust Co. vs. Tonawanda R. R. Co., 103 N. Y., 249.
Raht vs. Attrill (1887), 106 N. Y., p. 432.

As to the right of a holder of Receiver's certificates to come in to the prejudice of general creditors, see

Appeal of Neafie (1888), 12 At. Rep., 271.

What applies to bondholders must more surely be true of the holders of better securities than bonds, and Vane's lien, if he has any at all, must be one subsequent in point of time and inferior in grade to the lien of the Receiver's certifictes.

The case of Tommey vs. The Spartenberg and Asheville R. R. Co. before cited is in all its details so thoroughly on "all fours" with the case under discussion that it deserves especial notice.

The Spartenberg and Asheville Railroad executed a mortgage on its property. Thereafter a firm by the name of Fry & Deal entered into a contract with the railroad to build four trestles. Fry was a mechanic and worked himself on the trestles and superintended the labor; the firm furnished the materials.

One Garrison also made a contract with the company to build the "trestle bridge." He also was a mechanic and did some of the work, but his principal labor was as a contractor to superintend the mechanics and laborers employed under him.

Upon the failure of the company both Fry & Deal and Garrison filed mechanics' liens, gave notices thereunder and instituted proceedings to enforce the liens. Their matter was referred to a Master, who held that the sum they claimed was due them, but that their claims must be postponed to the claims of bondholders. To this they excepted, and the Court on the hearing of the exceptions said:

" * * * The mortgage was duly executed by the " company 1 October, 1876, and bonds to the amount " of $642,000 were sold or hypothecated and came into " the hands of the plaintiff and others for value *bona* " *fide.* * * * The defendant creditors claim that " they have as contractors and laborers a lien upon the " road prior and superior to the bondholders, and are " first entitled to the proceeds of the sale of the road " if the Court should decree one. This is the prin- " cipal question in the case.* These claimants are of " two classes. First, those who have filed in the proper

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*The other question was whether these contractors had filed liens under the correct statute which the Court did not think worth discussion as it made no difference.

" court, mechanics' and laborers' liens. Second, those " who have not filed such liens in the State Court, but " claim a lien by statute. Of the first class, are Fry " Deal and Garrison, &c., whose claims are fully " set out by the master. These claims, we think, " ought not to be allowed *except as postponed to the* " *mortgage debt.*"

The Court also held the other claims postponed.

See also

Union Trust Co. vs. Ill. R. R. Co., 117 U. S., 437.

See also the very recent case of

Hassall vs. Wilcox (Apr., 1889), 130 U. S., 493–505.

THE THEORY OF AN ESTOPPEL.

The appellant further claims a lien by estoppel born of the contract or agreement of the Receivers bearing date the 19th of November, 1884 (fol. 115), inasmuch as by that agreement they acknowledged a lien, and thus made it binding on the company. It must be apparent that had the Receivers done so (but we contend they did not), and even had they gone further, and expressly admitted Vane's claim as a first lien, and promised payment therefor, their act would have been utterly void and of no effect.

Receivers are *ministerial* officers merely, bound by the orders of the Court, without the judicial discretion necessary to create binding liens.

Beach on Receivers, 1.

Where certain materials and supplies were furnished to a railroad corporation, which afterwards went into the hands of Receivers who agreed and promised to pay for said materials, and upon the said parties claiming a specific lien by reason of said promise, the Court disposed of their claim very summarily, saying :

"These petitioners have no specific lien, legal or "equitable, upon this property. The fact that Spenser "and Mattson and Litchfield (the Receivers) *agreed* to "pay them did not create a specific lien."

Dennison vs. C. A. & St. L. Ry. Co., 4 Bissell, 414.

But the fact is the Receivers made no such agreement as is claimed.

Let us look at the words of the stipulation which it is claimed now estops the Receivers from denying Vane's lien :

"* * * It is hereby understood and agreed that "the telegraph wires on the poles of the Bankers' and "Merchants' Telegraph Company in the State of In-"diana which were strung by J. E. Vane, and upon "which *he claims a lien*, shall be connected," * * * "but it is also expressly understood that such use of "said wires shall not be construed in any way or to "any extent as impairing or interfering with *the lien* "of the said Vane thereon."

"The lien of the said Vane thereon" are presumably the words which are relied upon to create an estoppel.

To what words does "the lien" refer? What lien is meant?

Looking back we find the sentence "wires strung by J. E. Vane, and upon which *he claims a lien*." These are evidently the words to which "the lien" refers. Therefore, this expression must mean "the lien which Vane claims," that is, the claimed or *alleged* lien.

Nothing can be plainer than this. It is said to be too late "to *interpolate* words" into the stipulation.

It is certainly needless; the necessary words are already there. But the *elimination* of important words cannot be allowed in order to enable the appellant to apply equitable doctrines and rules to a case, which, as it stands, presents no question which cannot be solved by the principles of grammatical construction.

The Status of the Receiver's Certificates.

The Court, as we have seen, issued Receiver's certificates and made them a first and paramount lien upon the property of this company.

They were on their face subject to no equities. The orders creating them contained no limitation, condition or exception to their priority.

The faith of the Court was and is pledged to their payment. They are acknowledged as paramount to the bonds.

The law with great uniformity upholds the claims of bondholders as against those of contractors, laborers, employees and the like, some Courts more exclusively and strenuously than others, but all tending in a direction favorable to mortgage debts.

The adjudications upon the lien of Receiver's certificates are few (Beach on Receivers, 392).

Their status is too plain to admit of discussion, for the reasoning applied to bondholders must be applicable to the holders of Receiver's certificates, who are not only bondholders in the ordinary sense, but bondholders entitled to the greatest consideration from the Courts, in that they are purchasers *on the faith of the statements of the Court.*

If a chance to apply the equitable doctrine of estoppel is wanted, this situation affords a golden opportunity (Bank of Montreal vs. Thayer, 7 Fed., 622).

The rights of these parties have accrued. Law and Equity approve their claims.

The Court cannot disregard them.

Conclusion.

The appellees contend and respectfully submit:

(1) That Vane, a contractor, has no lien under "the employees act;" but if he has, his lien must be subject to the claims of the holders of Receiver's certificates.

(2) He has no common law lien. Had he never parted with the property, his lien would not avail against holders of liens created by the Courts for the preservation of the property and in payment of construction.

(3) There is no estoppel in the stipulation of Nov. 19, 1884. Even if the Receivers had expressly allowed and admitted a lien, their action would have been void and of no effect.

The decision of the Circuit Court should be affirmed.

Respectfully submitted,

ROBERT G. INGERSOLL,

Of Counsel for Appellees.

NEW YORK, Oct. 22, 1889.